89-2001

No.——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
Petitioners,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MERLIN E. REMMENGA
PANHANDLE EASTERN PIPE LINE COMPANY
TRUNKLINE GAS COMPANY
5400 Westheimer Court
Houston, Texas 77056
(713) 627-5400

RAYMOND N. SHIBLEY
Counsel of Record
BRUCE W. NEELY
MARLENE L. STEIN
LEBOEUF, LAMB, LEIBY & MACRAE
1333 New Hampshire Ave., N.W.
Suite 1100
Washington, D.C. 20036
(202) 457-7500

Attorneys for Panhandle Eastern Pipe Line Company and Trunkline Gas Company

KIM M. COCKLIN
Senior Vice President and General Counsel
DOUGLAS FIELD, JR.
Assistant General Counsel
TEXAS GAS TRANSMISSION CORPORATION
3800 Frederica Street
Owensboro, Kentucky 42301
(502) 926-8686

ROBERT W. PERDUE
ANDREWS & KURTH
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 662-2700

Attorneys for Texas Gas Transmission Corporation

(Attorneys Continued on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

JEFFREY A. BRUNER
General Attorney
TRANSCONTINENTAL GAS PIPE
LINE CORPORATION
P.O. Box 1396
Houston, Texas 77251
(713) 439-3156

ROBERT G. HARDY
MICHAEL J. FREMUTH
ANDREWS & KURTH
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 662-2700
Attorneys for Transcontinental Gas Pipe Line Corporation

June 22, 1990

QUESTION PRESENTED

Whether the court below erroneously construed Section 4 of the Natural Gas Act to restrict unjustifiably the statutory ratemaking powers of the Federal Energy Regulatory Commission, thereby precluding the Commission from effecting what the court itself acknowledged was an apparently equitable distribution among the customers of regulated natural gas pipelines of certain gas supply costs that arose during a period when the Commission, for administrative reasons, imposed a moratorium on the statutorily authorized recovery of such costs.

LIST OF PARTIES

The parties before the U.S. Court of Appeals for the District of Columbia Circuit were:

Petitioners

Columbia Gas Transmission Corporation
Michigan Consolidated Gas Company
Municipal Defense Group
Philadelphia Electric Company
Philadelphia Gas Works

Respondent

Federal Energy Regulatory Commission

Intervenors (Supporting Petitioners)

Process Gas Consumers Group
UGI Corporation

Intervenors (Supporting Respondent)

Panhandle Eastern Pipe Line Company
Trunkline Gas Company
Texas Gas Transmission Corporation
Transcontinental Gas Pipe Line Corporation

Other Intervenors

Atlanta Gas Light Company
CNG Transmission Corporation
General Service Customer Group and
Panhandle Customer Group
Indiana Gas Company, Inc.
Kansas Power & Light Company
Public Service Electric and Gas Company
Washington Gas Light Company

Panhandle was the petitioner and FERC the respondent in No. 89-1186, which was consolidated with Nos. 88-1701, 88-1808, 88-1825, 89-1052, 89-1086, 89-1140 and 89-1200.

In this instant proceeding, the Petitioners are Panhandle Eastern Pipe Line Company, Trunkline Gas Company, Texas Gas Transmission Corporation and Transcontinental Gas Pipe Line Corporation.

Trunkline Gas Company is a wholly-owned subsidiary of Panhandle Eastern Pipe Line Company. Panhandle Eastern Pipe Line Company is a wholly-owned subsidiary of Panhandle Eastern Corporation, which is publicly-owned. Panhandle Eastern Corporation has only one affiliate that has publicly-owned voting securities, TEPPCO Partners, LP.

Transcontinental Gas Pipe Line Corporation and Texas Gas Transmission Corporation are wholly-owned subsidiaries of Transco Energy Corporation, which is publicly-owned. One of the latter's affiliates, Transco Exploration Partners, Ltd., has publicly-owned voting securities.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT	3
A. Statutory and Regulatory Background	4
B. The Pipelines' "Direct Billing" Proposals	6
C. The D.C. Circuit's Decisions on Review of FERC's Orders	8
REASONS FOR GRANTING THE WRIT	11
PRAYER FOR RELIEF	23

TABLE OF AUTHORITIES

Judicial Decisions: Page

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) ..... *passim*
Associated Gas Distributors v. FERC, 893 F.2d 349 (D.C. Cir. 1989), *reh'g denied*, 898 F.2d 809 (D.C. Cir. 1990), *stay issued* (D.C. Cir. April 23, 1990) 17, 22
Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 1468 (1988) 6, 8, 18
Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 16
City of Girard v. FERC, 790 F.2d 919 (D.C. Cir. 1986) 16
City of Piqua v. FERC, 610 F.2d 950 (D.C. Cir. 1979) 14
FERC v. Martin Exploration Management Co., 486 U.S. 204 (1988) 4
FPC v. Hope Natural Gas Co., 320 U.S. 591 (1941) 13
FPC v. Natural Gas Pipeline Co., 315 U.S. 575 (1942) 12
Hall v. FERC, 691 F.2d 1184 (5th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983) 14
Maislin Industries, U.S., Inc. v. Primary Steel, Inc., No. 89-624 (U.S. June 21, 1990) 11, 15
Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986) 21
Office of Consumers' Counsel v. FERC, 826 F.2d 1136 (D.C. Cir. 1987) 16
Office of Consumers' Counsel v. FERC, 783 F.2d 206 (D.C. Cir. 1986) 6
Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 12, 15
Phillips Petroleum Co. v. State of Wisconsin, 347 U.S. 672 (1954) 4
Phillips Petroleum Co. v. FERC, No. 88-1257 (10th Cir. April 30, 1990) ..... passim

TABLE OF AUTHORITIES—Continued

Page

Public Service Comm'n of New York v. Mid-Louisiana Gas Co., 463 U.S. 319 (1983) 4, 18
Public Utilities Comm'n of California v. FERC, 894 F.2d 1372 (D.C. Cir. 1990) 18
Shell Offshore, Inc. v. FERC, 858 F.2d 1147 (5th Cir. 1988) 21
Tennessee Valley Municipal Gas Ass'n v. FERC, 470 F.2d 446 (D.C. Cir. 1972) 16
Texas Eastern Transmission Corp. v. FERC, 769 F.2d 1053 (5th Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986) ..... *passim*
Transwestern Pipeline Co. v. FERC, 897 F.2d 570 (D.C. Cir. 1990), *reh'g en banc denied*, (D.C. Cir. May 31, 1990) 16, 17, 18
United Gas Improvement Co. v. Callery Properties, Inc., 382 U.S. 223 (1965) 16
Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) 17

Administrative Orders:

Order No. 94: Order Amending Interim Regulations Under the Natural Gas Policy Act of 1978 and Establishing Policy Under the Natural Gas Act, 45 Fed. Reg. 53,099 (1980), *on reh'g, Order No. 94-A*, 48 Fed. Reg. 5,152, *Order No. 94-B*, 48 Fed. Reg. 5,190 (1983), *aff'd sub nom. Texas Eastern Transmission Corp. v. FERC*, 769 F.2d 1053 (5th Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986) ..... *passim*
Order No. 473, Compression Allowances and Protest Procedures Under Natural Gas Policy Act Section 110, 52 Fed. Reg. 21,660 (1987), *reh'g granted in part, Order No. 473-A*, 53 Fed. Reg. 15 (1988), *aff'd in part and remanded in part sub nom. Phillips Petroleum Co. v. FERC*, No. 88-1257 (10th Cir. April 30, 1990) 5, 10, 20

TABLE OF AUTHORITIES—Continued

Statutes: Page

Natural Gas Act:

Section 4, 15 U.S.C. § 717c (1988) ..... *passim*
Section 5(a), 15 U.S.C. § 717d(a) (1988) 12, 13, 16

Natural Gas Policy Act of 1978:

Section 110(a), 15 U.S.C. § 3320 (1988) ..... *passim*
Section 601(c)(2), 15 U.S.C. § 3431 (1988) 6, 21

Regulations:

18 C.F.R. § 154.63(e)(2) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. ——

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
Petitioners,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, a group of interstate natural gas pipeline companies, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the District of Columbia Circuit is reported as *Columbia Gas Transmission Corp.* v. *FERC*, 895 F.2d 791 (D.C. Cir. 1990) ("*Columbia-II*"). (App. 1a-14a.) In an unreported order dated April 19, 1990, the court denied motions for rehearing and suggestions for rehearing *en banc* filed by the petitioner pipelines. (App. 15a.) On May 30, 1990, the D.C. Circuit stayed its mandate until June 22, 1990. (App. 16a.)

The agency orders that were before the D.C. Circuit in *Columbia II* are reported as *Transcontinental Gas Pipe Line Corp.*, 45 FERC ¶ 61,169 (1988), *reh'g and reconsideration denied*, 46 FERC ¶ 61,066 (1989), and

Panhandle Eastern Pipe Line Co., 44 FERC ¶ 61,173, *reh'g denied by operation of law*, 44 FERC ¶ 61,418 (1988). (App. 17a-41a.)

The previous case in this proceeding (known as *Columbia-I*), wherein the D.C. Circuit ordered a remand that led to the orders reviewed in *Columbia-II*, *is* reported as *Columbia Gas Transmission Corp.* v. *FERC*, 831 F.2d 1135 (D.C. Cir. 1987), *modified on reh'g*, 844 F.2d 879 (1988). (App. 42a-59a.) The agency orders that were before the court in *Columbia-I* are reported as *Transcontinental Gas Pipe Line Corp.*, 32 FERC ¶ 61,230, *reh'g and clarification denied*, 33 FERC ¶ 61,213 (1985); *Texas Eastern Transmission Corp.*, 32 FERC ¶ 61,493, *reh'g denied*, 33 FERC ¶ 61,257 (1985); *Texas Gas Transmission Corp.*, 33 FERC ¶ 61,032, *reh'g denied*, 33 FERC ¶ 61,359 (1985); *Trunkline Gas Co.*, 33 FERC ¶ 61,217 (1985), *reh'g denied*, 34 FERC ¶ 61,021 (1986); *Panhandle Eastern Pipe Line Co.*, 33 FERC ¶ 61,218 (1985), *reh'g denied*, 34 FERC ¶ 61,231 (1986). (App. 60a-142a.)

JURISDICTION

The judgment sought to be reviewed was entered by the D.C. Circuit on February 9, 1990; the court's order denying motions for rehearing and suggestions for rehearing *en banc* was issued April 19, 1990. Jurisdiction in this Court to review the judgment below by writ of certiorari exists pursuant to 28 U.S.C. § 1254(1) (1988).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Sections 4 and 5(a) of the Natural Gas Act of 1938, 15 U.S.C. §§ 717c and 717d(a); Sections 110(a) and 601(c)(2) of the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3320(a) and 3431(c)(2), are reproduced in pertinent part at App. 143a-148a.

STATEMENT

The court below held that the Federal Energy Regulatory Commission ("Commission" or "FERC"), which is authorized by Congress (as was its predecessor, the Federal Power Commission [1]) to regulate sales and transportation of natural gas in interstate commerce, was powerless to effect an admittedly equitable distribution of certain costs associated with producing and gathering natural gas ultimately sold by interstate pipelines to their wholesale customers. The costs in question are substantial, totalling approximately $1.5 billion for the industry as a whole, and the Commission had undertaken a program to authorize their collection by producers, and recovery by interstate pipelines, in accordance with explicit provisions of the Natural Gas Policy Act of 1978. The restraint imposed upon the Commission by the court below frustrates the pipeline cost recovery portion of the Commission's program. During the period 1980-1983, the Commission, for administrative reasons, precluded producer-suppliers from including such costs in the price of gas sold to pipelines. While the Fifth Circuit in a related case held that the pipelines could be required to reimburse their upstream producer-suppliers for these costs for the preceding period, the District of Columbia Circuit in this case concluded that the Commission could not authorize the pipelines in turn to distribute the same costs proportionately among the downstream utilities to whom the gas was resold, purportedly because this constituted retroactive ratemaking.

---

[1] The term "Commission" is used interchangeably herein to refer to the Federal Energy Regulatory Commission for the period beginning October 1, 1977, and to the Federal Power Commission prior to that date. *See Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 574 n.3 (1981).

A. Statutory and Regulatory Background

Although the Natural Gas Act ("NGA") was enacted in 1938, the Commission did not undertake to regulate wholesale sales of natural gas by independent producers until after this Court's decision in *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672 (1954), which held such sales to be within the Commission's jurisdiction. In response to widespread shortages during the 1970's, Congress enacted the Natural Gas Policy Act of 1978 ("NGPA"). "The NGPA is designed to preserve the Commission's authority under the NGA to regulate natural gas sales from pipelines to their customers; however, it is designed to supplant the Commission's authority to establish rates for the wholesale market, the market consisting of so-called 'first sales' of natural gas." *Public Service Comm'n of New York* v. *Mid-Louisiana Gas Co.*, 463 U.S. 319, 331 (1983). *See also FERC* v. *Martin Exploration Management Co.*, 486 U.S. 204, 207-208 (1988). "Moreover, the statute replaces the Commission's authority to fix rates of return to gas producers according to what is 'just and reasonable' with a precise schedule of price ceilings." *Mid-Louisiana Gas Co.*, 463 U.S. at 334.

Section 110(a) of the NGPA provides in effect that certain costs incurred by producers and recouped in "first sales" need not be counted against the statutory price ceilings. These include, among other things, costs of compression and gathering that are "borne by the seller and allowed for, by rule or order, by the Commission." § 110(a)(2). In 1980, FERC issued its Order No. 94, 45 Fed. Reg. 53,099 (1980), a rulemaking order that among other things imposed a moratorium on the collection by producers of the costs attributable to compression and gathering of gas. A moratorium was necessary, the Commission concluded, because the appropriate allowance for these activities presented a complex question and the Commission needed time to develop a factual

basis upon which allowances could be authorized generically, a case-by-case approach being impractical under the circumstances. *Id.* at 53,107-53,108. Nevertheless, the Commission emphasized that it would institute a "retroactive collection procedure" once the generic rulemaking was complete. *Id.* at 53,107.[2]

Three years later, the Commission issued final rulemaking orders, Order No. 94-A, 48 Fed. Reg. 5152 (1983), and Order No. 94-B, 48 Fed. Reg. 5190 (1983), "containing its long-promised regulations addressing generic compression and gathering cost allowances." *Columbia-I*, App. 48a. True to its word, the Commission in those orders authorized retroactive collection by producers of the production-related costs that had been the subject of the three-year moratorium. Various pipelines and consumer representatives petitioned for judicial review of that aspect of the rules, among others, arguing that the Commission lacked authority to authorize retroactive collection of the new cost allowances by producers. In *Texas Eastern Transmission Corp.* v. *FERC*, 769 F.2d 1053, 1066 (5th Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986), the Fifth Circuit denied this contention, concluding that the Commission's approach "was a fair balancing of the various problems involved: the sellers' need for allowances, the purchasers' need for notice, and the Commission's need to make a thorough study prior to setting allowances."[3] (More recently, in *Phillips Pe-*

---

[2] The pipelines, for their part, were prohibited under longstanding Commission regulations from attempting to recover costs before they were "known and measurable with reasonable accuracy." 18 C.F.R. § 154.63(e)(2).

[3] The Fifth Circuit in *Texas Eastern* also held that FERC had erred in not providing for collection by producers of certain additional production-related costs, and directed FERC to provide for such collection "to the same extent and retroactive to the same date" as other costs. 769 F.2d at 1065-1066. FERC did so in 1987, in Order No. 473, 52 Fed. Reg. 21,660, *aff'd in part and remanded in part sub nom. Phillips Petroleum Co.* v. *FERC*, No. 88-1257 (10th Cir. April 30, 1990).

troleum Co. v. *FERC*, No. 88-1257 (10th Cir. April 30, 1990), the Tenth Circuit, citing the Fifth Circuit's decision in *Texas Eastern*, likewise concluded that the Commission in Order No. 94 had given purchasers proper notice that retroactive allowances would be authorized for yet additional Section 110 costs.)

A final relevant provision of the statutory scheme is NGPA Section 601(c), entitled "Guaranteed Passthrough," which provides in pertinent part that "the Commission may not deny any interstate pipeline recovery of any amount paid with respect to any purchase of natural gas," so long as the amounts paid are consistent with the statutory pricing requirements and the Commission's rules thereunder. These include the production-related costs covered by Section 110. Indeed, the only gas purchase costs incurred by pipelines that are *not* subject to this "guaranteed passthrough" are those found to be "excessive due to fraud, abuse, or similar grounds." § 601(c)(2); *see generally Office of Consumers' Counsel* v. *FERC*, 783 F.2d 206, 213-214 (D.C. Cir. 1986). No such allegations are present in this case.

B. The Pipelines' "Direct Billing" Proposals

As a consequence of the Commission rules affirmed by the 1985 *Texas Eastern* decision of the Fifth Circuit, the interstate pipelines were compelled to pay Section 110 production-related costs to their producer-suppliers retroactively for the 1980-1983 moratorium period. By 1985, however, the pipeline segment of the industry was in the process of a massive restructuring that was being fostered by the Commission in an effort to carry out its view of its statutory mandate under the Natural Gas Act and the NGPA. *See generally Associated Gas Distributors* v. *FERC*, 824 F.2d 981, 994-997 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 1468 (1988) (*"AGD-I"*). The basic thrust of this restructuring was to diminish the pipelines' longstanding role as sellers of gas and to increase their role as transporters of gas owned by

third-party shippers. Certain pipeline sales customers (including the respondents in this case), who were favorably situated, took advantage of the opportunities made possible by the Commission's initiatives and drastically reduced their purchases from the pipelines. As a result of these regulatory initiatives and related developments in gas markets, the customer base of the pipelines had changed to an unprecedented degree between the lifting of the Commission's moratorium in 1983 and the time of the Fifth Circuit's *Texas Eastern* decision in 1985. *See Transcontinental Gas Pipe Line Corp.* ("*Transco*"), Order on Remand, App. 23a.

To accommodate these changes, a number of pipelines proposed in separate filings before the Commission in 1985 to "direct bill" the production-related costs from the earlier moratorium period to their resale customers. Under these proposals, the pipelines would bill their customers for such costs on the basis of the ratio of each customer's purchases to the pipeline's total jurisdictional sales during the moratorium period. This approach, the pipelines pointed out, had two advantages over the alternative of simply including the moratorium costs in rates as a "current" gas expense. *See Transco*, Order Authorizing Direct Billing, App. 64a-65a. First, because the pipelines were experiencing dramatic, unprecedented changes in customer profiles, in particular a shift away from traditional sales to third-party transportation, billing the costs as a current gas expense would produce inequities; in particular, customers whose levels of purchases from the pipeline had declined would bear less than their proportionate share of the costs.[4] Second,

---

[4] In some instances, certain pipeline customers were able to cease completely their purchases from their traditional pipeline suppliers, and instead to buy gas on the spot market and have it transported under third-party pipeline transportation arrangements. As the Commission recognized, if the NGPA Section 110 production-related costs arising during the 1980-1983 moratorium were passed through in 1985 or thereafter in current pipeline rates for gas sales, a cus-

the pipelines pointed out, their commodity charges for gas would be bloated by an influx of three years' worth of costs, thereby distorting natural gas sales markets, which at the time were already in disarray. *See generally AGD-I*, 824 F.2d at 995-996 (describing economic and regulatory developments in the interstate gas industry in the early 1980's).

The Commission accepted these proposals for direct billing. As the Commission said of the first such proposal, "[i]t is administratively effective, equitable, and meets our concern that pricing signals not be distorted by the influx of substantial retroactive Order No. 94-A costs." *Transco*, App. 66a. The Commission concluded that direct billing "will break the logjam that has existed and permit a relatively speedy passthrough of long overdue cost responsibility." *Id.* The Commission also rejected contentions that the direct billing mechanism constituted invalid retroactive ratemaking, citing, in one of its orders, the Fifth Circuit's denial of a similar claim in the *Texas Eastern* case. *Panhandle Eastern Pipe Line Co.*, App. 115a; *see also Transco*, Order Denying Rehearing, App. 128a-129a.

C. The D.C. Circuit's Decisions on Review of FERC's Orders

On judicial review, a panel of the D.C. Circuit concluded that the Commission's orders authorizing direct billing of Section 110 costs attributable to the 1980-1983 moratorium period was impermissible. As the court of appeals viewed it, "the effect of the orders is quite clear: downstream purchasers are expected to pay a surcharge, over and above the rates on file at the time of sale, for gas they had already purchased. However described, this constitutes a retroactive rate increase that we find to be prohibited by the NGA." *Columbia-I*, App. 51a. The

---

tomer in this position would totally escape all responsibility for such costs.

court of appeals suggested that this problem would not be insurmountable, had the customers of the pipelines received "adequate notice" of their potential liability during the 1980-1983 moratorium. Although there was notice to the *pipelines* that they would be liable for these costs to their producer-suppliers, in the court's view, such notice was not adequate to alert the downstream customers who purchased gas supplies from the pipelines during that period. *Id.*[5]

In an order on rehearing, however, the court of appeals found that, "[i]n view of the magnitude of the costs at issue in this case," it would clarify, as requested by the parties, that the Commission was "free to consider" whether, notwithstanding the panel opinion, it should authorize the pipelines' direct billing proposals pursuant to its waiver authority under Section 4(d) of the Natural Gas Act. *Columbia-I*, App. 59a.

On remand, FERC again approved the direct billing proposals, this time on the basis of a waiver issued under Section 4(d). App. 17a-26a. There was "no question," the Commission found, that a waiver here was "in the public interest." App. 21a-22a. Absent a waiver, it was inevitable that "many of those customers who used the gas during the 1980 to 1983 period will not pay these compression and gathering costs. Instead, current cus-

---

[5] The notice of potential retroactive liability for production-related costs provided by the Order 94 series, the court of appeals concluded, "was limited to a highly restricted audience" of producers and other "first sellers." App. 54a. Ironically, Columbia Gas Transmission Corporation, the lead petitioner in the court of appeals, although a downstream customer of the petitioner pipelines, also was a pipeline purchasing gas during the 1980-1983 moratorium period directly from producers. Thus, the court of appeals held, in effect, that although the notice in Order No. 94 may have been adequate to Columbia in its role as a *first* purchaser of Section 110 gas from producers, it was not adequate notice to Columbia with respect to its purchases from other pipelines.

tomers will pay these costs for those former customers." App. 23a. The Commission concluded:

> Equity and the public interest demand that these costs [estimated to run as high as $1.5 billion for all producers combined] be both recovered by the pipelines and fairly allocated by the pipelines to those who benefitted from the activities by which the costs were incurred. Accordingly, we conclude that the public interest is best served by granting the section 4(d) waiver.

Id. (footnote omitted).

In *Columbia-II*, the court of appeals again vacated and remanded the FERC orders.[6] The court found "no support" (App. 13a) for the Commission's statutory interpretation that on a finding of sufficient cause, it has the authority under Section 4(d) of the Natural Gas Act to grant waiver to allow recovery of the deferred costs at issue here, for good cause shown. The court acknowledged that "[t]he Commission may well be correct in its assessment of the equities here involved and of the distortion in market signals that may result from the allocation of $1.5 billion in prior production costs to current sales." App. 13a. Nevertheless, there was no flexibility under the statute, the court concluded, for the Commission "to mitigate the damage its errors of judgment or rulemaking delays may have caused." *Id.* Since the Commission, according to the court, had not

---

[6] Also before the court in this consolidated proceeding were FERC's orders authorizing one pipeline to direct bill its customers for $17 million in Section 110 costs stemming from FERC's Order No. 473 production-related costs. *Panhandle Eastern Pipe Line Co.*, 44 FERC ¶ 61,173, *reh'g denied by operation of law*, 44 FERC ¶ 61,418 (1988). (App. 33a-39a.) Order No. 473 governs the deferred recovery of one category of Section 110 production-related costs. *Order No. 473, Compression Allowances and Protest Procedures Under Natural Gas Policy Act Section 110*, 52 Fed. Reg. 21,660 (1987), *reh'g granted in part, Order No. 473-A*, 53 Fed. Reg. 15 (1988), *aff'd in part and remanded in part sub nom. Phillips Petroleum Co. v. FERC*, No. 88-1257 (10th Cir. April 30, 1990).

given adequate notice at the beginning of the moratorium, "the Commission was without authority to impose a retroactive surcharge for whatever cause." *Id.*

REASONS FOR GRANTING THE WRIT

This Court should grant a writ of certiorari in this case for three reasons. First, the case presents an important question of statutory construction concerning the scope of FERC's power to authorize, by means of its statutory waiver authority, a surcharge for the collection of those costs which the Commission had earlier ordered deferred until further order to permit their accurate determination. It does not, as the court of appeals' opinion may be read to imply, concern the "filed rate doctrine," recently addressed and reaffirmed by this Court in an Interstate Commerce Act case, *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, No. 89-624 (June 21, 1990), since no party here is seeking to enforce a rate not filed with, and accepted by, the Commission; on the contrary, these rates were so filed and accepted before the amounts at issue were collected. Second, the same restrictive and erroneous view of the Commission's powers adopted by the court of appeals in this case, and erroneously attributed to the filed rate doctrine, has been carried over and applied by that court in a series of other recent cases, thereby thwarting several major regulatory programs adopted by the Commission. Finally, there is a conflict in result between, on the one hand, the decision of the Fifth Circuit in the *Texas Eastern* case (as well as the Tenth Circuit's recent decision in *Phillips Petroleum*), which held that FERC did not err in authorizing producers to retroactively bill pipelines for NGPA Section 110 production-related costs incurred in 1980-1983 while the Commission-imposed moratorium was in effect, and, on the other hand, the decision below, which held that FERC was powerless to authorize the pipelines, in turn, to bill their customers for these same costs on the basis of the customers' actual purchases during the 1980-1983 moratorium period.

1. It is well-settled that the Commission's powers in approving the rates and conditions of service of interstate natural gas pipelines and other regulated entities are broad and flexible. As this Court has stated, "the breadth and complexity of the Commission's responsibilities demand that it be given every reasonable opportunity to formulate methods of regulation appropriate for the solution of its intensely practical difficulties." *Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968); *see also id.* at 767. The Commission "must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests." *Id.* at 767. Towards this end, this Court has consistently rejected claims premised on a restrictive view of the Commission's discretion in rate cases. On the contrary, the Commission "is free 'to make the pragmatic adjustments which may be called for by particular circumstances.'" *Id.* at 800, *quoting FPC* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942). "Surely the Commission's broad responsibilities . . . demand a generous construction of its statutory authority." *Permian Basin*, 390 U.S. at 776 (citations and footnote omitted).

At issue here is the interplay between these precepts and the principle that, as this Court explained in *Arkansas-Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 578 (1981) ("*Arkla* v. *Hall*"), "[n]ot only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively." (Footnote omitted.) This rule against retroactive ratemaking, as it applies to natural gas pipelines, is attributed to the language and structure of Sections 4 and 5(a) of the Natural Gas Act.

Section 4 contains five subsections. First, and foremost, Section 4(a) provides that rates subject to federal jurisdiction under the Act must be "just and reasonable,"

and declares that any rates that are not just and reasonable are "unlawful." Second, Section 4(b) prohibits undue preferences or discrimination among customers. The third subsection, § 4(c), requires regulated companies to keep their rates on file with the Commission. The fourth subsection, § 4(d), is the source of the controversy in this case. It provides in relevant part:

> *Unless the Commission otherwise orders*, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and the public . . . . *The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for* by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

15 U.S.C. § 717c(d) (emphasis added). This provision "imposes a procedural requirement that is designed to protect the substantive policy interests reflected in the three preceding subsections." *Arkla* v. *Hall*, 453 U.S. at 595 (Stevens, J., dissenting). Finally, Section 4(e) provides the ground-rules for the filing of proposed rate changes by a regulated entity, including the Commission's power to "suspend" a rate increase so that it can be placed into effect "subject to refund."

Section 5(a) of the Gas Act, in turn, authorizes the Commission, upon a finding of unlawfulness, to "fix" a new rate to be "thereafter observed." This section prohibits the Commission from retroactively changing rates or ordering reparations. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944).

Generally speaking, then, Section 4 requires the pipeline to charge only the rates on file and to provide notice to the Commission before changing rates, and Section 5(a) prohibits the Commission itself from retro-

actively changing a rate. However, this Court in *Arkla* v. *Hall* expressly left open the question whether, under Section 4(d), the Commission in appropriate circumstances might waive the statutory notice requirement. 453 U.S. at 578 n.8.[7]

In the instant case, the court of appeals purported to resolve this important statutory question in a manner that so severely constricts the Commission's discretion to grant waivers under Section 4(d) as to virtually read that power out of the statute. The court effectively stated that the statutory waiver is available to the Commission only to shorten the thirty-day notice period for rate change filings. App. 10a. Under the court of appeals' view, the Commission can *never* grant a waiver of the statutory notice period to authorize a supplemental charge for the recovery of deferred costs, as it did here—even if those amounts had been deferred by a valid Commission order. According to the court, the cases that appear to recognize such authority are all distinguishable, either on the ground that they involved pre-existing agreements by the parties to a retroactive rate (App. 12a), or, as in *Texas Eastern*, on the ground that the Commission itself gave "notice at the outset that the rates being promulgated [were] provisional only and subject to later revision." App. 13a.

This crabbed view of the Commission's waiver powers is wholly at odds with the language of Section 4(d), which requires "good cause," not agreement by the parties or advance notice by the Commission. It also is inconsistent with the Commission's broad ratemaking

---

[7] Indeed, the producer-sellers in *Arkla* v. *Hall* ultimately did persuade a reviewing court to remand a Commission decision denying their request for waiver of Section 4(d). *Hall* v. *FERC*, 691 F.2d 1184, 1191-1192 (5th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983). Moreover, prior to *Arkla* v. *Hall*, the D.C. Circuit itself had affirmed the Commission's grant of a waiver "for good cause shown" to permit newly filed rates to be given retroactive effect. *City of Piqua* v. *FERC*, 610 F.2d 950 (D.C. Cir. 1979).

powers as construed by this Court in *Permian Basin* and other cases.

Nor do the facts of this case raise an issue under the "filed rate doctrine," as the court of appeals' decision may be read to imply. As this Court recently explained in *Maislin Industries, supra,* slip op. 8-10, the filed rate doctrine prohibits both the regulated entity and its customers from enforcing any rate other than the filed rate. Here, in contrast, the issue is whether the Commission has the authority to approve a surcharge to recover deferred costs, the recovery of which is expressly authorized by statute. As noted above, these rates were all on file, and the collections were at the filed rate levels.

The error of the D.C. Circuit's approach is highlighted by its concession (App. 13a) that the Commission's assessment of the equities and the public interest in this instance appeared to be sound. Under the view advocated by the respondents here, and adopted by the court below, pipeline customers who purchased Section 110 gas during the 1980-1983 moratorium, but who fortuitously or designedly are purchasing lesser quantities of gas from their historic pipeline suppliers today, will escape their fair share of responsibility for these costs, which by now have been paid to producers by the pipelines. Thus, the court has stood the statutory ratemaking provisions on their head: instead of protecting the Commission's jurisdiction to determine whether rates meet the Act's standards, the court's interpretation of the statute accomplishes the perverse result of preventing the Commission from authorizing rates it has determined are needed to meet those standards.[8] In so doing, the

---

[8] Ironically, moreover, the D.C. Circuit's decision does not advance either of the goals of the filed rate doctrine articulated by this Court in *Arkla* v. *Hall, viz.*, "preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant." 453 U.S. at 577-578. Indeed, it hinders these objectives.

court of appeals has disregarded the plain teaching of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984), that courts should defer to a regulatory agency's interpretation of the organic statutes it administers.

There is, to be sure, some tension between the Commission's waiver power under Section 4(d) and the general requirement that both changes proposed by the pipelines under Section 4 and changes ordered by the Commission can only take effect prospectively. *See City of Girard* v. *FERC*, 790 F.2d 919, 924 (D.C. Cir. 1986) ("resolution of the conflict between the waiver power and the retroactive ratemaking rule presents difficult questions of statutory interpretation and regulatory policy").[9] The statute can and should be interpreted to give effect to both provisions. But the court of appeals clearly sweeps too broadly in holding that waiver may *never* be granted except in the limited circumstances where there is either agreement among the parties or advance notice by the Commission that a rate is subject to change.

Another panel of the court of appeals has already recognized one exception: where the Commission has unreasonably delayed the establishment of a prospective rate under Section 5(a). *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570, 578 n.5 (D.C. Cir. 1990), *reh'g en banc denied* (D.C. Cir. May 31, 1990). This reflects the long established rule that the Commission has ample power to "undo what is wrongfully done by virtue of its order." *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 229 (1965); *accord: Office of Consumers' Counsel* v. *FERC*, 826 F.2d 1136 (D.C. Cir. 1987); *Tennessee Valley Municipal Gas Ass'n* v. *FPC*, 470 F.2d 446 (D.C. Cir. 1972). By the same token, when the Commission has affirmatively delayed

---

[9] The court of appeals in *City of Girard* found it unnecessary to resolve the question, since it agreed with FERC that good cause justifying a waiver was not present on the facts of that case in any event. 790 F.2d at 924.

the establishment of new prospective rates by the pipelines because it is in the midst of formulating a major new regulatory initiative, as it was here, and the Commission's initiative by its nature cannot be brought to completion immediately, the Commission necessarily must possess the authority, by virtue of the discretion expressly granted in Section 4(d), to implement the program it ultimately finds just and reasonable, notwithstanding that the regulated utility itself could not do so by reason of the rule against retroactive ratemaking.

In short, the court of appeals is fundamentally wrong in its belief that FERC is powerless "to mitigate the damage its errors of judgment or rulemaking delays may have caused." App. 13a.

2. The importance of the question presented is demonstrated by the fact that this is but one of four recent cases in which the D.C. Circuit has, in effect, dismantled major regulatory initiatives of the Commission on the basis of the same restrictive view of the statute adopted by the court in this case. Taken together, these cases constitute a major intrusion by the court of appeals into the orderly administration by the Commission of a complex and important regulatory scheme, and in that sense run afoul of this Court's decision in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543-544 (1978).

Two such cases—*Associated Gas Distributors* v. *FERC*, 893 F.2d 349, 354-357 (D.C. Cir. 1989), *reh'g denied*, 898 F.2d 809 (D.C. Cir. 1990) (mandate stayed) (*"AGD-II"*), and *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d at 576-581—invalidated, on the basis of the D.C. Circuit's novel view of the statute, Commission efforts to address outmoded pipeline-producer contracts in the wake of major Commission initiatives promoting third party transportation rather than traditional pipeline sales of gas. The Commission's transportation initiatives predictably left the pipelines stranded with billions of

dollars in "take-or-pay" liability to producer-suppliers under preexisting gas supply contracts. The Commission had failed to take any measures to address such contracts in the transportation rulemaking orders, which the D.C. Circuit in *AGD-I* (824 F.2d at 1021-1030) found to be a lapse in reasoned decisionmaking. Thus, the Commission's efforts to comply with the mandate of the court of appeals in *AGD-I* have been hamstrung and possibly sidetracked altogether because of the same rigid interpretation of the statute that permeates the court of appeals' reasoning in the instant case. Similarly, in *Public Utilities Comm'n of California* v. *FERC*, 894 F.2d 1372, 1382-1384 (D.C. Cir. 1990), the court of appeals found that the Commission's proposal to use amounts remaining in a pipeline's deferred tax account, following a change in the pricing of pipeline-produced gas under this Court's decision in *Mid-Louisiana Gas Co.*, *supra*, to reduce the pipeline's current rates constituted invalid retroactive ratemaking, since it would force the pipeline to return revenues collected under FERC-approved rates.

We emphasize, moreover, that the foregoing cases all arise at a time of profound changes in the interstate natural gas industry produced largely by the Commission's initiatives to carry out the policy of the recently enacted NGPA. As Chief Judge Wald stated in a dissent from the denial of rehearing *en banc* in the *Transwestern* case:

> I think the Court's current interpretation of the filed rate doctrine is overly rigid, at a time when the FERC needs latitude to navigate the recent dramatic changes in the structure of the natural gas industry. . . . It remains for the Supreme Court to settle this important question of how impenetrable a barrier the filed rate doctrine is to FERC's efforts at allocating the inevitable burdens stemming from fundamental readjustment of the pipeline industry.

Transwestern Pipeline Co. v. *FERC*, Nos. 88-1046, *et al.* (D.C. Cir. May 31, 1990) (order denying suggestions

for rehearing *en banc*) (separate statement of Chief Judge Wald). Thus, the court of appeals' unduly narrow view of the Commission's ratemaking powers only serves to undermine the overarching regulatory principle that costs should be borne by those on whose behalf they are incurred.

An additional consideration lending importance to the statutory question presented here is the fact that the ratemaking provisions of the Natural Gas Act are fundamentally similar to those of the Federal Power Act. *See Arkla* v. *Hall*, 453 U.S. at 577 n.7. Thus, it is all but certain that the D.C. Circuit's erroneous reasoning in this and the other gas cases discussed above, if not corrected by this Court, eventually will be carried over by the court to the electric power industry as well. It also may have implications for the Interstate Commerce Commission and other federal regulatory agencies that administer similar statutes.

3. Finally, the Court should grant certiorari because of the conflicting—and extremely inequitable—results created by the Fifth Circuit's decision in *Texas Eastern*, which affirmed the legality of the producers' retroactive recovery of production-related costs from pipelines, and the D.C. Circuit's decision here, which (by denying FERC the authority to grant waiver for good cause shown) prevented the pipelines from recovering those same costs from their downstream customers after being billed by their producer-suppliers.

In *Texas Eastern*, three of the petitioners herein, Panhandle Eastern Pipe Line Company, Trunkline Gas Company, and Transcontinental Gas Pipe Line Corporation, among others, sought review of several aspects of Order Nos. 94 and 94-A. The pipelines maintained "that the Commission should not have permitted any *retroactive* recovery of either allowances or interest." *Texas Eastern*, 769 F.2d at 1064 (emphasis added). However, the Fifth Circuit rejected the pipelines' argument and expressly approved the retroactive recovery that the Com-

mission authorized in the Order No. 94 series. *Id.* Indeed, the Fifth Circuit even required the Commission to permit additional charges, retroactively. 769 F.2d at 1065-1066.

Similarly, in the recent *Phillips Petroleum* case, the Tenth Circuit affirmed in part and remanded in part FERC's Order Nos. 473 and 473-A, which, like the Order No. 94 series, authorized retroactive collection by producers of certain production-related costs under NGPA Section 110. The Tenth Circuit, citing the *Texas Eastern* case, found that the Commission in Order No. 94 had given purchasers "proper notice" of the collection of retroactive allowances. *Phillips Petroleum*, slip op. 18.

The Commission consistently has maintained that in the Order No. 94 program it intended to give, and in good faith believed that it had given, adequate notice to the entire natural gas industry—producers, pipelines, both upstream and downstream, and the pipelines' jurisdictional customers—that recovery of production-related costs was only to be deferred, not denied. FERC could hardly have made it plainer that all rates charged for Section 110 gas during the Order No. 94 moratorium were, as the D.C. Circuit would put it in *Columbia-II*, "provisional only and subject to later revision." App. 13a. Yet, years later, and despite the Fifth Circuit's findings in *Texas Eastern*, the D.C. Circuit inexplicably concluded that the notice FERC had given in Order No. 94, although adequate as to the pipelines, somehow was inadequate as to the pipelines' customers, even though these customers cannot deny that under the most basic tenets of FERC ratemaking, the pipelines would be entitled, once the moratorium ended, to pass through to them the production-related costs paid to upstream suppliers for natural gas resold to the customers.[10] Indeed,

---

[10] Thus, the D.C. Circuit's finding that pipeline customers had inadequate notice that they would one day be charged for production-related costs is implausible. As the Fifth Circuit remarked under similar circumstances, the courts should "greet[] such assertions,

such passthrough is expressly "guaranteed" by Section 601(c) of the NGPA, absent fraud, abuse, or similar findings, none of which is alleged here.

The result of the conflict between the decisions of the D.C. Circuit in this case and the Fifth and Tenth Circuits, respectively, in *Texas Eastern* and *Phillips Petroleum*, is to force the petitioner pipelines—who have already paid the money at issue to their producer-suppliers—to allocate production-related costs not among those customers whose purchases gave rise to the costs (because, under *Columbia-II*, that methodology is deemed irreconcilable with the filed rate doctrine), but rather among current or future customers without regard to whether those customers actually bought the natural gas subject to the Order No. 94 moratorium. Perhaps not surprisingly, two of the principal critics of direct billing in this case, Columbia Gas Transmission Corporation and Michigan Consolidated Gas Company, have largely shed their historical pipeline suppliers (from whom they did buy, at provisional rates, during the Order No. 94 moratorium), and to that extent would escape all responsibility for production-related costs, even though they cannot dispute that their purchases from their supplier pipelines caused those pipelines to incur a substantial portion of the production-related costs. In essence, *Columbia-II* leaves the pipelines without an effective, equitable means of recovering production-related costs.[11]

---

made by highly sophisticated industry participants, with skepticism." *Shell Offshore, Inc.* v. *FERC*, 858 F.2d 1147, 1153 (5th Cir. 1988). This is particularly true as to Columbia Gas Transmission Corporation, one of the respondents, which was not only a downstream customer of several of the petitioner pipelines but also was itself a direct purchaser from producers and hence directly liable under the Order No. 94 program and the Fifth Circuit's *Texas Eastern* decision for its own retroactive Section 110 costs. *See* App. 25a n.25.

[11] In *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986), this Court characterized as "trapped costs" those expenses

Chief Judge Wald, in *AGD-II*, described the similar dilemma of pipelines attempting to recover from their customers the costs of reforming outmoded take-or-pay contracts with their producer-suppliers:

> The panel's overly rigid interpretation of the filed rate doctrine to invalidate that Order leaves the FERC essentially powerless to take care of the take-or-pay crisis. The panel suggests that if pipelines wish to share their multi-billion dollar loss with consumers, they must do so by adding a surcharge to future sales. In a competitive market, of course, the "take-or-pay" pipelines will not be able to do this since such surcharges would raise their prices to an uncompetitive level. But even if some costs could be passed on to future consumers, that would still mean that total losses would be allocated inequitably. Those consumers who are in a position to take advantage of open-access shipping will bear proportionately less of the loss than those who cannot—even though the former (by switching to other pipelines) are the ones responsible for the loss.

AGD-II, 898 F.2d at 811 (Wald, C.J., dissenting from denial of rehearing *en banc*).

We submit that the same inequities are present here; indeed, the petitioners' dilemma in this case is even more compelling than in *ADG-II*, because here the inability to recover production-related costs results from the Com-

---

allowed by the FERC and subsequently disallowed from recovery by a state regulator. Although this case does not present a question of federal preemption, it does raise the specter of "trapped costs" resulting from divergent appellate decisions: On the one hand, *Texas Eastern* and *Phillips Petroleum* authorized producer-suppliers to collect production-related costs on a deferred basis from the interstate pipelines, yet, on the other hand, *Columbia-II* forbids the pipelines precisely the same type of recovery mechanism. That *Columbia-II* achieves this anomalous result only emphasizes its erroneous view of the Commission's broad powers under the Natural Gas Act.

mission's own decision in Order No. 94 that recovery of such costs be deferred. The extraordinary inequity of this situation to the pipelines and their remaining sales customers, arising as it does from a conflict in result between the decision of the D.C. Circuit in this case, on the one hand, and the decisions of the Fifth and Tenth Circuits, on the other hand, warrants the granting of certiorari.

PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, the petitioners respectfully request that this Court grant certiorari to review the judgment of the U.S. Court of Appeals for the D.C. Circuit and hold that the Commission's orders authorizing the direct billing of NGPA Section 110 production-related costs should be affirmed.

Respectfully submitted,

MERLIN E. REMMENGA
PANHANDLE EASTERN PIPE LINE COMPANY
TRUNKLINE GAS COMPANY
5400 Westheimer Court
Houston, Texas 77056
(713) 627-5400

RAYMOND N. SHIBLEY
Counsel of Record
BRUCE W. NEELY
MARLENE L. STEIN
LEBOEUF, LAMB, LEIBY & MACRAE
1333 New Hampshire Ave., N.W.
Suite 1100
Washington, D.C. 20036
(202) 457-7500

Attorneys for Panhandle Eastern Pipe Line Company and Trunkline Gas Company

KIM M. COCKLIN
Senior Vice President and General Counsel
DOUGLAS FIELD, JR.
Assistant General Counsel
TEXAS GAS TRANSMISSION CORPORATION
3800 Frederica Street
Owensboro, Kentucky 42301
(502) 926-8686

ROBERT W. PERDUE
ANDREWS & KURTH
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 662-2700

Attorneys for Texas Gas Transmission Corporation

JEFFREY A. BRUNER
General Attorney
TRANSCONTINENTAL GAS PIPE LINE CORPORATION
P.O. Box 1396
Houston, Texas 77251
(713) 439-3156

ROBERT G. HARDY
MICHAEL J. FREMUTH
ANDREWS & KURTH
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 662-2700
Attorneys for Transcontinental Gas Pipe Line Corporation

June 22, 1990

89-2001

No.——

Supreme Court, U.S.
FILED
JUN 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
Petitioners,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MERLIN E. REMMENGA
PANHANDLE EASTERN PIPE LINE COMPANY
TRUNKLINE GAS COMPANY
5400 Westheimer Court
Houston, Texas 77056
(713) 627-5400

RAYMOND N. SHIBLEY
Counsel of Record
BRUCE W. NEELY
MARLENE L. STEIN
LEBOEUF, LAMB, LEIBY & MACRAE
1333 New Hampshire Ave., N.W.
Suite 1100
Washington, D.C. 20036
(202) 457-7500
Attorneys for Panhandle Eastern Pipe Line Company and Trunkline Gas Company

KIM M. COCKLIN
Senior Vice President and General Counsel
DOUGLAS FIELD, JR.
Assistant General Counsel
TEXAS GAS TRANSMISSION CORPORATION
3800 Frederica Street
Owensboro, Kentucky 42301
(502) 926-8686

ROBERT W. PERDUE
ANDREWS & KURTH
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 662-2700
Attorneys for Texas Gas Transmission Corporation

(Attorneys Continued on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

JEFFREY A. BRUNER
General Attorney
TRANSCONTINENTAL GAS PIPE LINE CORPORATION
P.O. Box 1396
Houston, Texas 77251
(713) 439-3156

ROBERT G. HARDY
MICHAEL J. FREMUTH
ANDREWS & KURTH
1701 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 662-2700
Attorneys for Transcontinental Gas Pipe Line Corporation

June 22, 1990

APPENDIX
TABLE OF CONTENTS

	Page
Opinion of the Court of Appeals (*Columbia-II*)	1a
Order of the Court of Appeals Denying Rehearing and Suggestions for Rehearing *En Banc* (*Columbia-II*)	15a
Order of the Court of Appeals Staying its Mandate (*Columbia-II*)	16a
Order of the FERC on Remand Granting Waivers (*Transco*)	17a
Order of the FERC Denying Rehearing and Reconsideration (*Transco*)	27a
Order of the FERC Granting Authority to Implement Direct Billing Procedure (*Panhandle*)	33a
FERC Notice of Denial of Rehearing by Operation of Law (*Panhandle*)	41a
Opinion of the Court of Appeals (*Columbia-I*)	42a
Opinion of the Court of Appeals on Petitions for Rehearing (*Columbia-I*)	57a
Order of the FERC Granting Petitions to Institute Direct Billing Procedure for Retroactive Production-Related Cost Allowances (*Transco*)	60a
Order of the FERC Granting Petitions to Institute Direct Billing Procedure for Retroactive Production-Related Cost Allowances (*Texas Eastern*)	79a
Order of the FERC Granting Petitions to Institute Direct Billing Procedure for Retroactive Production-Related Cost Allowances (*Texas Gas*)	87a
Order of the FERC Granting Petitions to Institute Direct Billing Procedure for Retroactive Production-Related Cost Allowances (*Trunkline*)	97a
Order of the FERC Granting Petitions to Institute Direct Billing Procedure for Retroactive Production-Related Cost Allowances (*Panhandle*)	110a
Order of the FERC Denying Rehearing and Clarification (*Transco*)	124a
FERC Notice of Denial of Rehearing (*Texas Eastern*)	134a
FERC Notice of Denial of Rehearing (*Texas Gas*)	135a

APPENDIX
TABLE OF CONTENTS—Continued

	Page
Order of the FERC Denying Rehearing (*Trunkline*)	136a
Order of the FERC Denying Rehearing (*Panhandle*)	140a
Statutory Provisions	143a

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 88-1701, 88-1808, 88-1825, 89-1052,
89-1086, 89-1140, 89-1186 and 89-1200

COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

GENERAL SERVICE CUSTOMER GROUP, INDIANA GAS COMPANY, INC., PANHANDLE EASTERN PIPE LINE COMPANY, THE KANSAS POWER AND LIGHT COMPANY,
Intervenors.

Petitions for Review of Orders of the
Federal Energy Regulatory Commission

Argued Oct. 12, 1989

Decided Feb. 9, 1990

Stephen J. Small, Boston, Mass., with whom John H. Pickering, Timothy N. Black, Neal T. Kilminister, Susan D. McAndrew, and Richard E. Gottlieb (for Columbia Gas Transmission Corp.), Jeffrey M. Petrash, Washington, D.C., (for Michigan Consol. Gas Co.), Robert A. MacDonnell, Philadelphia, Pa., and Kathleen A. Kane

(for Philadelphia Elec. Co.) were on the joint brief, for listed petitioners in Nos. 88-1701, 88-1808, 89-1052, 89-1086, and 89-1200.

Philip B. Malter, with whom Charles F. Wheatley, Jr. was on the brief, for petitioner Municipal Defense Group in Nos. 88-1825 and 89-1140.

Raymond N. Shibley and Marlene L. Stein, Washington, D.C., were on the brief for petitioner Panhandle Eastern Pipe Line Co. in No. 89-1186.

Frederic J. Georg entered an appearance for petitioner Columbia Gas Transmission Corp., and James H. Holt, Washington, D.C., entered an appearance for petitioner Michigan Consol. Gas Co.

Jill Hall, Atty., F.E.R.C. ("FERC"), with whom Catherine C. Cook, Gen. Counsel, and Jerome M. Feit, Solicitor, FERC, Washington, D.C., were on the brief, for respondent in all cases. Frank Lindh, Washington, D.C., and Joseph S. Davies, Attys., FERC, also entered appearances for respondent.

Raymond N. Shibley, with whom Marlene L. Stein (for Panhandle Eastern Pipe Line Co.), Robert G. Hardy and Michael J. Fremuth (for Transcontinental Gas Pipe Line Corp.), Douglas Field, Jr. and Robert W. Perdue, Washington, D.C., (for Texas Gas Transmission Corp.) were on the joint brief, for intervenors in Nos. 88-1701, 88-1808, 88-1825, 89-1052, 89-1086, 89-1140, and 89-1200.

William H. Penniman (for Process Gas Consumers Group) and Mary E. Baluss and Marilyn A. Specht, Washington, D.C., (for UGI Corp.) were on the joint brief for intervenors in Nos. 89-1052, 89-1086, 89-1140 and 89-1200. Christopher J. Barr, Washington, D.C., also entered an appearance for UGI Corp.

Martin J. Bregman, Topeka, Kan., and Steven J. Kalish, Washington, D.C., entered appearances for in-

tervenor Kansas Power and Light Co. in Nos. 88-1701, 88-1808, and 88-1825.

Before BUCKLEY, D.H. GINSBURG,* and SENTELLE, Circuit Judges.

Opinion for the court filed by Circuit Judge BUCKLEY.

BUCKLEY, Circuit Judge:

These consolidated cases concern the assertion, by the Federal Energy Regulatory Commission, of the power to approve a retroactive rate increase through exercise of its authority, under section 4(d) of the Natural Gas Act, to waive the thirty days' notice required by that section. As we find that the Commission lacks such power, we remand seven of the cases for action consistent with this opinion and dismiss the eighth as moot.

I. Background

A. Regulatory Background

In section 110(a) of the Natural Gas Policy Act of 1978, Congress provided that sellers of natural gas could lawfully recover

> any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission.

15 U.S.C. § 3320(a). In July 1980, acting pursuant to this rulemaking authority, the Federal Energy Regulatory Commission ("FERC" or "Commission") informed gas producers that it intended to allow them, as "first sellers" of natural gas, to pass certain field compression and gathering costs through to their pipeline customers

---

* Judge Ginsburg heard argument in, but did not participate in the disposition of, this case.

("first purchasers"). Order No. 94, 45 Fed.Reg. 53,099 (1980) ("Order No. 94"). At the same time, the Commission stated that it would not accept applications for the recovery of these costs until it had completed further rulemaking to establish an appropriate generic allowance for such costs ("deferred costs"). *Id.* at 53,107-08. The Commission assured the producers that the new regulations would provide a retroactive mechanism by which they could recover the costs that were determined to be allowable, from the effective date of Order No. 94 until the new regulations took effect. *Id.* The new rules authorizing their recovery were issued almost three years later, in March 1983. Order No. 94-A, 48 Fed.Reg. 5,152 (1983); Order No. 94-B, 48 Fed.Reg. 5,190 (1983).

Under existing procedures, the first purchaser pipelines could recover these deferred charges from their current customers through the purchased gas adjustment clauses ("PGA clauses") authorized by Commission regulations. 18 C.F.R. §§ 154.301-.310 (1988). These clauses, which must be filed with and approved by the Commission, permit pipelines to recover through *prospective* sales the estimated production-related costs they will be required to reimburse producers. Rather than pursue this method, however, five pipeline companies petitioned FERC for permission to "direct bill" customers who had purchased gas produced during the 1980-83 period ("second purchasers") for the deferred costs incurred in its production.

The petitioning pipelines noted that buying patterns in the industry had changed significantly during the three years that had elapsed between the issuance of Order No. 94 and Order No. 94-A. As a consequence, it could not be assumed that the current customers who would have to absorb the newly authorized charges prospectively through PGA clauses were in any way representative of those who, during those three years, had purchased the gas that was subject to the deferred costs. The pipelines argued

that considerations of equity required that those who had purchased that gas pay its true cost through a system of direct billing surcharges based on past purchases.

B. Procedural Background

After the Commission approved each of these petitions,** various second purchasers petitioned for rehearing. When all such requests were denied, Columbia Gas Transmission Corp., The Municipal Defense Group, and Transcontinental Gas Pipe Line Corp. petitioned for review in this court, arguing that the allowance of the direct billing amounted to retroactive ratemaking prohibited by the Natural Gas Act ("NGA" or "Act"). We agreed, struck the orders authorizing direct billing, and remanded the case to the Commission for further proceedings consistent with our opinion. *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1142 (D.C. Cir. 1987) (*"Columbia* I").

We based our decision on a finding that the Commission's orders had violated the well-established "filed rate doctrine." This doctrine, we noted, finds its origins in sections 4(c) and 5(a) of the Natural Gas Act, 15 U.S.C. §§ 717c(c), 717d(a), which require that every natural gas company file rate schedules with the Commission that will then govern the amounts they can bill their customers. 831 F.2d at 1140. The purpose of this rule is to maintain predictability in the rates that will be charged, and this purpose is accomplished by the guarantee that rate changes will only be made prospectively. In arriving

---

** *Transcontinental Gas Pipe Line Corp.*, 32 F.E.R.C. ¶ 61,230, *reh'g and clarification denied*, 33 F.E.R.C. ¶ 61,213 (1985); *Texas Eastern Transmission Corp.*, 32 F.E.R.C. ¶ 61,493, *reh'g denied*, 33 F.E.R.C. ¶ 61,257 (1985); *Texas Gas Transmission Corp.*, 33 F.E.R.C. ¶ 61,032, *reh'g denied*, 33 F.E.R.C. ¶ 61,596 (1985); *Panhandle Eastern Pipe Line Co.*, 33 F.E.R.C. ¶ 61,218 (1985), *reh'g denied*, 34 F.E.R.C. ¶ 61,231 (1986); and *Trunkline Gas Co.*, 33 F.E.R.C. ¶ 61,217 (1985), *reh'g denied*, 34 F.E.R.C. ¶ 61,021 (1986).

at our decision, we specifically rejected FERC's contention that Order No. 94 gave "everyone" notice of an impending increase in rates, finding instead that Order No. 94 was "addressed exclusively to first sales of natural gas." *Id.* We thus held that in the absence of such notice, FERC's allowance of direct billing for surcharges on previously purchased gas violated the rule against retroactive ratemaking.

FERC petitioned for rehearing, asserting that notwithstanding our opinion and although the point had not been argued on appeal, the Commission had implied authority, under section 4(d) of the Act, to waive the filed rate doctrine prohibiting retroactive changes in published rates. Section 4(d) provides:

> Unless the Commission otherwise orders, no changes shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. . . . *The Commission, for good cause shown, may allow changes to take effect without providing the thirty days' notice herein provided for* by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

15 U.S.C. § 717c(d) (1982) (emphasis added). The Commission maintained that the waiver issue had "crystallized" only after we had found that the Commission had given inadequate notice to warrant lawful retroactive ratemaking. Presumably, FERC was suggesting that because the filed rate doctrine requires adequate notice of any rate change and because it has the power, under section 4(d), to waive the notice requirement with good cause shown, the Commission may, by dispensing with this impediment, lawfully implement a rate retroactively.

As for the good cause required by section 4(d), FERC found it in the adverse effects that would flow from a

misallocation of the more than $1.5 billion in deferred compression and gathering costs that had accumulated from July 1980 through March 1983. Not only would passing these costs along to current customers place the burden on purchasers of entirely unrelated gas, it would send the wrong market signals by distorting the true cost of current gas supplies.

We declined to rehear the case; but in light of the magnitude of the costs that were involved, we stated that on remand,

> FERC [would be] free to consider the waiver issue and determine whether it may issue new orders on grounds consistent with the principles enunciated in our earlier opinion in this case.

Columbia Gas Transmission Corp. v. FERC, 844 F.2d 879, 880 (D.C.Cir.1988).

On remand, FERC asserted that it had unquestioned authority to waive the filed rate doctrine for good cause shown; and given the unique circumstances of this case, it concluded its previous orders should be reaffirmed and implemented. *Transcontinental Gas Pipe Line Corp.*, 45 F.E.R.C. ¶ 61,169 (1988). The Commission correctly noted that in *Columbia I* we held the direct billing procedure in the circumstances of these cases to violate the prohibition in sections 4(c) and 5(a) of the Act against retroactive ratemaking. Nonetheless, it concluded that irrespective of whether Order Nos. 94 and 94-A constituted notice to downstream purchasers sufficient to overcome the prohibition against retroactive ratemaking, "the overriding public interest in the maintenance of orderly gas markets through the equitable allocation of costs" made it "necessary and appropriate in these proceedings, under section 4(d) of the Natural Gas Act, to waive the filed rate doctrine." *Id.* at 61,488 & n. 26.

Subsequently, in response to a petition by Panhandle Eastern Pipe Line Co. ("Panhandle") for permission to

direct bill its customers, the Commission purported to waive the filed rate doctrine for Panhandle as it had in the cases on remand from this court. *Panhandle Eastern Gas Pipe Line Co.*, 44 F.E.R.C. ¶ 61,173 (1988). Various parties petitioned this court for review. In addition, Panhandle petitioned for review of *Panhandle Eastern Gas Pipe Line Co.*, 45 F.E.R.C. ¶ 61,444 (1988) (Letter Order), in which FERC limited Panhandle to sixty days of accrued interest in its direct billing. The Commission then sought and received this court's order consolidating all of these petitions because of the common legal issues presented.

II. Discussion

A. FERC's Waiver Authority Under Section 4(d)

The Supreme Court has provided the following summary of the filed rate doctrine:

> [T]he Act bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and *prevents the Commission itself from imposing a rate increase for gas already sold.*

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 578, 101 S.Ct. 2925, 2931, 69 L.Ed.2d 856 (1981) (emphasis added).

On remand, the Commission correctly identified the issue before it, and now before us, as "whether the Commission can and, in the circumstances of these cases, should waive the filed rate doctrine." 45 F.E.R.C. at 61,486. The Commission proceeded to resolve immediately the question of its authority to waive the doctrine:

> The Commission's authority to waive the filed rate doctrine and its discretion whether to exercise this authority in particular circumstances are unquestioned. The only limitation imposed upon the Commission by the statute is that the grant of a waiver must be "for good cause shown."

Id. (citations omitted). It then spent the remainder of its opinion justifying the exercise of its authority in this particular case.

We find the scope of the section 4(d) waiver authority far less obvious than the Commission does. As we observed just three years ago:

> No court has squarely decided whether the Commission's waiver power may extend backward past the original filing date absent the parties' agreement. Indeed, resolution of the conflict between the waiver power and the retroactive ratemaking rule presents difficult questions of statutory interpretation and regulatory policy. . . . [T]he Supreme Court has noted the potential conflict between the ban on retroactive ratemaking and the Commission's waiver power. . . .

City of Girard v. FERC, 790 F.2d 919, 924 (D.C.Cir. 1986) (citing *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 n.8, 101 S.Ct. 2925, 2930-31 n.8, 69 L.Ed.2d 856 (1981)). We conclude that while the Commission has considerable latitude to waive the notice requirement under section 4(d), its powers do not encompass what it claims in this case.

We begin by observing that FERC's reliance on *City of Girard, supra*, and *United Gas Pipe Line Co. v. FERC*, 707 F.2d 1507, 1511 (D.C.Cir.1983), for the proposition that its power to waive the filed rate doctrine is unquestioned, 45 F.E.R.C. at 61,486 and n. 12, is completely misplaced. Even a cursory reading of *City of Girard* will show that, far from holding that FERC had unquestioned authority to waive the filed rate doctrine, we took pains to avoid the question and resolved the issue by affirming the Commission's own determination that "good cause" was lacking. 790 F.2d at 924-25. Indeed, in *Girard*, the Commission would arguably have had a stronger case for retroactive action, as the municipality there was requesting only its reclassification into another category, that of full-requirements user, for which a valid tariff was al-

ready in force, rather than, as here, requesting a retroactive change in a valid tariff. Nonetheless, we specifically "decline[d] to address" the issue of whether FERC's waiver power may extend backward past the original filing date. *Id.* at 924. *United Gas Pipe Line Co.*, for its part, is irrelevant to the issue before us. That case dealt with the Commission's power to waive its own regulation prohibiting a certain transportation rate adjustment mechanism, 18 C.F.R. § 154.38(d)(3), *see United Gas Pipe Line Co.*, 707 F.2d at 1509, and not with the waiver of the statutorily grounded filed rate doctrine.

Although the question of FERC's authority to waive the filed rate doctrine was technically left open by prior decisions, we believe the statutory language of section 4(d) and the logic of our decisions in *City of Piqua v. FERC*, 610 F.2d 950 (D.C.Cir.1979), and *Columbia I* deny the Commission the authority it claims. It is clear from the statutory language that section 4(d) is directed at the situation in which a utility, in this case a natural gas company, wishes to make a change in a rate that is already in full legal effect. The section stipulates that "no change [in filed rates] shall be made" by a company "except after thirty days' notice to the Commission and to the public." 15 U.S.C. § 717c(d). Further in the same paragraph, the Commission is given authority, with good cause shown, to "allow changes to take effect without the thirty days' notice herein provided for." *Id.*

It is apparent that this statutory notice, which the Commission may waive on a showing of good cause, is not the notice of prospective rate adjustments to which we referred in *Columbia I* when we stated that the NGA's prohibition against retroactive rate increases might have been overridden if FERC had provided "adequate notice that [downstream] purchasers would be expected to pay the deferred charges at a later date." 831 F.2d at 1140. That statement was addressed to those circumstances in which the Commission has authorized increases in prices

previously paid by purchasers who were already on notice that the prices they were paying were provisional only.

Thus, in *City of Piqua v. FERC*, 610 F.2d 950, 954-55 (D.C.Cir.1979), this court considered the siuation where a utility provider and a town had contractually agreed upon a new, higher rate to take effect, by terms of the contract, on May 10, 1977. *Id.* at 951. Filing with the Commission was delayed for a few months because of the need to have the agreement approved by local authorities. *Id.* We held in that case that FERC, in approving the agreement, had not engaged in retroactive ratemaking: "the negotiated ratechange was not retroactive; it was prospective from the date of the contract." *Id.* at 954. As the Commission's waiver gave only prospective effect to the rate change, it did not implicate the filed rate doctrine.

The Fifth Circuit reached the same conclusion in *Hall v. FERC*, 691 F.2d 1184 (5th Cir.1982). In that case, the Commission had denied a request for the waiver of statutory notice so that a "favored nations clause" in a filed contract could be given effect. The Commission based its denial on the prohibition against retroactive rate increases. *Id.* at 1191. In finding that the Commission had erred, the court noted that in the circumstances of the case, "the Commission's waiver gives prospective application to the rates contractually authorized by the parties at the effective date contemplated by the contract." *Id.* at 1192. The court also made another significant observation. Referring to an earlier case for comparison, the court noted that where a company "sought a higher rate than that ever filed with the Commission or contemplated by the rate schedule/contract," then a "purer example of an action for a retroactive rate increase would be difficult to imagine;" thus "a waiver of section 4(d) notice filing requirements was *neither involved nor applicable.*" *Id.* at 1191 (emphasis added).

The Commission acknowledges that courts have found "good cause for granting a waiver" only where the parties had *previously* agreed to a rate change. 45 F.E.R.C. at 61,487 n. 20. It then attempts to distinguish *City of Piqua* and *Hall* by arguing that while the courts have found "good cause" in giving effect to the "intent of the parties" in those cases, that is not the only basis upon which it can show good cause for granting a waiver. *Id.* at 61,487 & n. 20. As it has found that the public interest and equity require the approval of direct billing in these cases, the Commission asserts that it has sufficient cause, under section 4(d), to grant a waiver even without consent of the parties. *Id.*

But here again, the Commission misinterprets those cases where a seemingly "retroactive" rate was approved. *City of Piqua* and *Hall* did not authorize the Commission to impose rate retroactively *because* giving effect to the parties' intent is a policy of the Act and therefore "good cause" within the meaning of section 4(d). Rather, those cases found that because of pre-existing agreements between the parties and the notice that went automatically with them, those rates were not in fact retroactive. *Id.* at 1192; *City of Piqua*, 610 F.2d at 954. *City of Piqua* is quite emphatic about this:

> The retroactive ratemaking rule thus bars . . . the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate. The present situation is immediately distinguishable. In this case, two parties agreed on new rate schedules and on the effective date for the new contract. The negotiated rate change was not retroactive; it was prospective from the date of the contract.

Id. at 954.

The same principle obtains when the Commission itself places parties on notice (as it did the first sellers and first buyers of natural gas in Order No. 94) that the rates they will be paying are subject to retroactive adjustment at a later date. This procedure, moreover, is squarely analogous to that in section 4(e) of the NGA in which the published rates, by express terms of the statute, remain subject to later modification and are therefore provisional in nature. 15 U.S.C. § 717c(e). Notice does *not* relieve the Commission from the prohibition against retroactive ratemaking. Instead, it changes what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision. This in no way dilutes the general rule that once a rate is in place with ostensibly full legal effect and is not made provisional, it can then be changed only prospectively.

In sum, we have found no support for the Commission's contention that on a finding of sufficient cause, it has the authority, under section 4(d), to waive the filed rate doctrine. Thus, as the Commission had failed to provide adequate notice to the downstream purchasers that the price they would be paying for gas during the 1980-83 period would be subject to adjustment, the Commission was without authority to impose a retroactive surcharge for whatever cause.

The Commission may well be correct in its assessment of the equities here involved and of the distortion in market signals that may result from the allocation of $1.5 billion in prior production costs to current sales. We are unaware, however, of any principle in equity or law that empowers an agency to ignore explicit legislative commands in order to mitigate the damage its errors of judgment or rulemaking delays may have caused.

B. FERC's Power to Limit Panhandle's Carrying Cost Recovery

Because we find that direct billing for these charges is unlawful under the Act, it follows that we need not decide the question of the lawfulness of FERC's denial of interest in excess of sixty days to Panhandle.

III. Conclusion

For the reasons discussed above, we hold that as it has no authority, under section 4(d), to waive the filed rate doctrine, the Commission has invalidly reinstated its prior orders. Accordingly, we dismiss as moot the petition in No. 89-1186, grant the other petitions for review, again strike the orders authorizing direct billing, and remand to the Commission for further proceedings consistent with this opinion.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1701

COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

and Consolidated Cases

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle and Thomas, Circuit Judges

ORDER

[Filed April 19, 1990]

The Suggestion For Rehearing *En Banc* of the intervenor pipelines has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1701

COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

and Consolidated Cases

BEFORE: Buckley, D.H. Ginsburg and Sentelle, Circuit Judges

ORDER

[Filed May 30, 1990]

Upon consideration of the motions for stay of mandate and of the response thereto it is

ORDERED, by the Court, that the Clerk is directed to withhold issuance of the Court's mandate through June 22, 1990.

Per Curiam
FOR THE COURT:

CONSTANCE L. DUPRE
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP85-148-007

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

Docket No. RP85-170-004

TEXAS EASTERN TRANSMISSION CORPORATION

Docket No. RP85-181-002

TEXAS GAS TRANSMISSION CORPORATION

Docket No. RP85-202-002

TRUNKLINE GAS COMPANY

Docket No. RP85-203-003

PANHANDLE EASTERN PIPE LINE COMPANY

ORDER ON REMAND GRANTING WAIVERS

(Issued November 1, 1988)

Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon, Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

The five separate proceedings captioned above have been remanded to the Commission by the United States Court of Appeals for the District of Columbia Circuit.[1]

---

[1] *See Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135 (D.C. Cir. 1987), *modified on reh'g*, 844 F.2d 879 (1988).

History of These Proceedings

The Commission had issued orders in each of these proceedings[2] granting the five pipeline companies authority to pass on to their purchasers under direct billing procedures certain retroactive production-related gathering and compression costs which the pipeline companies were required to pay their producers and suppliers pursuant to Section 110(a)(2) of the Natural Gas Policy Act of 1978 (NGPA),[3] and the Commission's Order No. 94 series implementing that section.[4]

---

[2] *Transcontinental Gas Pipe Line Corp.*, 32 FERC ¶ 61,230, *reh'g and clarification denied*, 33 FERC ¶ 61,213 (1985); *Texas Eastern Transmission Corp.*, 32 FERC ¶ 61,493, *reh'g denied*, 33 FERC ¶ 61,257 (1985); *Texas Gas Transmission Corp.*, 33 FERC ¶ 61,032, *reh'g denied*, 33 FERC ¶ 61,359 (1985); *Panhandle Eastern Pipe Line Co.*, 33 FERC ¶ 61,218 (1985), *reh'g denied*, 34 FERC ¶ 61,231 (1986); *Trunkline Gas Co.*, 33 FERC ¶ 61,217 (1985), *reh'g denied*, 34 FERC ¶ 61,021 (1986).

[3] 15 U.S.C. § 3320(a)(2). Section 110(a)(2) allows a first seller of natural gas to charge an amount exceeding the applicable maximum lawful price "to the extent necessary to recover . . . any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission."

[4] In July 1980, under Order No. 94, *FERC Statutes and Regulations* ¶ 30,178. the Commission allowed gas producers and other NGPA first sellers to recover some production-related costs as add-ons to NGPA ceiling prices. Cost recovery for compressing or gathering gas was postponed, however, pending a rulemaking to fix generic ceilings for these two kinds of production-related costs, and the Commission stated that, in the interim, no applications for recovery of such costs would be accepted. But the Commission, in Order No. 94, assured first sellers that "a retroactive collection procedure will be provided under which the allowance for compression [and gathering] costs determined under the generic rulemaking will be applied to costs incurred with respect to gas delivered on or after the effective date of this Rule if collection of such costs is contractually authorized." *FERC Statutes and Regulations* ¶ 30,178, at p. 31,218. That retroactive collection procedure was set in mo-

Pursuant to Order Nos. 94 and 94-A, producers in 1983 began charging pipeline customers the compression and gathering costs that had built up on deliveries made between July 1980 and March 1983. Pipelines so charged began passing these costs through to their customers under their PGA clauses.[5]

The pipelines soon experienced difficulties in attempting to recover these very substantial retroactive costs from their purchasers in the volatile natural gas market of the mid-1980s. As an alternative to recovering these costs in their PGAs, several pipelines therefore requested authority from the Commission to "direct bill" these costs. Under direct billing a pipeline would calculate each customer's share of the retroactive costs accrued during the years 1980 to 1983 based on that customer's actual purchases during each month to which the retroactive allowances applied. Each customer's total amount due, plus interest, would then be billed and paid in equal installments over several months or, at the customer's option, in a single lump-sum payment.

---

tion in March 1983 with the generic allowances of Order No. 94-A and related orders. See generally *FERC Statutes and Regulations* ¶ 30,419 and 18 C.F.R. § 271.1104(e). Order Nos. 94 and 94-A, including the retroactive collection provisions, were affirmed in relevant part in *Texas Eastern Transmission Corp. v. FERC*, 769 F.2d 1053 (5th Cir. 1985), *cert. denied*, 106 S. Ct. 1967 (1986).

[5] Because these costs were part of the pipeline's cost of purchasing gas, they could be recovered through PGA clauses. 18 C.F.R. §§ 154.301-.310. Additionally, as part of the NGPA first sale price, these costs were guaranteed passthrough under NGPA § 601, which provides that "[f]or purposes of Sections 4 and 5 of the Natural Gas Act," amounts lawfully paid as part of the NGPA first sale price are "deemed to be just and reasonable" and "the Commission may not deny any interstate pipeline recovery of any [such] amount . . . except to the extent the Commission determines that the amount paid was excessive due to fraud, abuse, or similar grounds." 15 U.S.C. § 3431(c)(2).

After the Commission approved such direct billing procedures in these five proceedings,[6] Columbia Gas Transmission Corporation (Columbia), which purchased gas from the five pipeline applicants during the retroactive period and is a party to each of these proceedings, appealed the Commission's five orders approving the direct billing procedures to the D.C. Circuit.

The court held that the pipelines' direct billing for retroactive production-related costs in the circumstances of these cases violated the prohibition in sections 4(c) and 5(a) of the Natural Gas Act[7] against retroactive ratemaking.[8] While recognizing that the prohibition against retroactive ratemaking "might have been overridden through adequate notice that purchasers would be expected to pay the deferred charges at a later date," the court found that no such notice had been given here. It held that Order Nos. 94 and 94-A provided the required notice only "to a highly restricted audience" of NGPA first sellers and their customers that those sellers could collect for past costs, and not to anyone else.[9] On rehearing, the Court, while declining to alter its earlier decision, did authorize the Commission on remand to consider whether it has the authority to waive the filed rate doctrine[10] in the circumstances of these cases and whether it is appropriate for the Commission to do so.

---

[6] *See* n. 2, *supra*, and accompanying text.

[7] 15 U.S.C. § 717c(c), 717d(a). These provisions form the basis for what is generally referred to as the "filed rate doctrine," the parameters of which the Supreme Court, in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981), explained to be that "the [Natural Gas] Act bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and prevents the Commission itself from imposing a rate increase for gas already sold."

[8] 831 F.2d at 1142.

[9] 831 F.2d at 1140.

[10] *See* n. 7, *supra*, and accompanying text. Under section 4(d) of the Natural Gas Act, 15 U.S.C. § 717c(d), the Commission may "for good cause shown" waive the advance notice requirement for the filing of an alteration in a rate.

Issues on Remand

The scope of the Commission's present analysis has been circumscribed by the court which instructed "that FERC is free to consider the waiver issue" but otherwise reversed the orders issued by the Commission.[11] What must first be considered, therefore, is whether the Commission can and, in the circumstances of these cases, should waive the filed rate doctrine. If these questions are answered in the affirmative, the Commission is then free, consistent with the court's directions, to leave its five previous orders intact. If, however, these answers are negative, a different solution consistent with the court's remand must be found.

Discussion

The Commission's authority to waive the filed rate doctrine and its discretion whether to exercise this authority in particular circumstances are unquestioned.[12] The only limitation imposed upon the Commission by the statute is that the grant of a waiver must be "for good cause shown." [13]

Here, while the pipelines' customers have opposed direct billing for the retroactive production-related gathering and compression costs, there is no question that the

---

[11] *See* 844 F.2d at 880.

[12] *City of Girard v. FERC*, 790 F.2d 919, 925 (D.C. Cir. 1986); *United Gas Pipe Line Co. v. FERC*, 707 F.2d 1507, 1511 (D.C. Cir. 1983). While the City of Girard case dealt with section 205 of the Federal Power Act, 16 U.S.C. § 824d, it is settled that "the relevant provisions of [the Natural Gas Act] are in all material respects substantially identical to the equivalent provisions of the Federal Power Act." *Appalachian Power Co. v. FPC*, 529 F.2d 342, 344 (D.C. Cir. 1976) (*quoting FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956)).

[13] 15 U.S.C. § 717c(d); Section 4(d) of the Natural Gas Act. *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 n. 8 (1981).

waiver is in the public interest. In each of these five proceedings, the Commission has previously made findings [14] that the pipelines' direct billing procedures are an equitable and practical method of allocating cost responsibility. Under these procedures, pricing signals are not distorted by the influx of substantial retroactive Order No. 94-A costs. Furthermore, these procedures equitably bill customers for the higher amounts they should have paid for gas based on actual purchases during the past billing periods and more accurately allow the true cost of current gas supplies to be reflected in the pipelines' PGAs. Thus, in approving these procedures, the Commission was only upholding the usual rule that it can use its equitable powers to require utility customers to bear costs incurred for their benefit where the benefits and costs are not simultaneous.[15]

In *Hall v. FERC*, the court stated that "perhaps [the] most compelling reason" for deciding whether a waiver of the filed rate doctrine should be granted or denied is whether a different group of consumers will pay for the gas than the ones who used it.[16] The court there found no evidence showing that the pipeline's customer profile had changed during the relevant period and therefore could neither affirm nor reverse the Commission's denial of the waiver on that basis alone. (The court did reverse the Commission's denial of the waiver, however, based upon lack of substantial evidence to support the four bases for the Commission's denial, including change in

---

[14] *E.g., Transcontinental Gas Pipe Line Corp.*, 33 FERC ¶ 61,213, at p. 61,443.

[15] *E.g., Public Systems v. FERC*, 709 F.2d 73, 80, 85-86 (D.C. Cir. 1983). *See also Mid-Tex Electric Cooperative v. FERC*, 773 F.2d 327, 349-50 (D.C. Cir. 1985); *Interstate Natural Gas Ass'n v. FERC*, 756 F.2d 166, 171 (D.C. Cir. 1985) (recognizing the importance of identifying customers receiving refunds due them).

[16] 691 F.2d 1184, 1192-93 (5th Cir. 1983), *cert. denied sub nom. ARKLA v. Hall*, 464 U.S. 822 (1983).

customer profile. *See* 691 F.2d at 1191, 1198.) There is no question here that the pipelines' customer profiles have changed. As a result, absent waiver, many of those customers who used the gas during the 1980 to 1983 period will not pay these compression and gathering costs. Instead, current customers will pay these costs for those former customers. Equity and the public interest demand that these costs [17] be both recovered by the pipelines and fairly allocated by the pipelines to those who benefitted from the activities by which the costs were incurred. Accordingly, we conclude that the public interest is best served by granting the section 4(d) waiver.[18]

The situation here is not analogous to those cases, including *City of Girard v. FERC*,[19] where the rate change involved arose out of a private contract and the parties' consent was considered essential.[20] In those cases, the courts were interpreting private contracts and were operating within the context of the seminal principles that

---

[17] This is not a penny-ante matter. Estimates of these costs for all producers range up to $1.5 billion.

[18] It is established that the Commission has broad authority to settle matters fairly. *E.g., Columbia Gas Transmission Corp. v. FERC*, 750 F.2d 105, 109 (D.C. Cir. 1984) ("The breath of agency discretion is, if anything, at [its] zenith" in the "fashioning of policies, remedies and sanctions . . . .") (payback of natural gas at contract, not market, price).

[19] *See* 790 F.2d at 925.

[20] The courts have consistently approved the "Commission's longstanding general policy . . . to find 'good cause [for granting a waiver]' only when the parties to the rate have agreed at some point in their negotiations on an effective date and the waiver is in the public interest." *See City of Girard v. FERC*, 790 F.2d at 924; *Hall v. FERC*, 691 F.2d at 1192; *City of Piqua v. FERC*, 610 F.2d 950 (D.C. Cir. 1979). In circumstances where the parties have agreed upon an effective date, the Commission waiver is not truly retroactive but rather gives "prospective application to the rates contractually authorized by the parties at the effective date contemplated by the contract." *Hall v. FERC*, 691 F.2d at 1192.

both the Federal Power Act and the Natural Gas Act were drafted to encourage and protect the right of parties to establish rates by individual contracts and that neither Act "evinces [any] purpose to abrogate private rate contracts as such."[21] In those cases, then, the Commission and courts were merely implementing the parties' intentions as expressed in their private contracts and the public interest was not opposed to such effectuation.[22]

In these proceedings, however, the circumstances mandate that the nature of and necessity for the parties' consent be evaluated in the context of the overriding public interest in the orderliness of the nation's natural gas markets and the ultimate benefit to gas consumers which will thereby result.

The proceedings at issue here evolved out of the generic Order No. 94 series which established and implemented the collection by producers from pipelines of reasonable gathering and compression costs.[23] The Commission's direct billing orders were likewise generic to the extent that they implemented the passthrough of these costs to all pipeline customers similarly situated.

It is unreasonable to have expected that pipelines could have formally agreed with their customers (many of whom were by then former customers) whereby those customers would reimburse the pipelines for their Order No. 94 series costs so long as those customers saw any possibility of avoiding these very substantial payments. At the same time, however, those customers, like Columbia, were fully cognizant, from their involvement in the

---

[21] *Hall v. FERC*, 691 F.2d at 1193 n. 16 (*quoting United Gas Pipe Line Co. v. Mobile Gas Corp.*, 350 U.S. 332, 338 (1956)).

[22] *See City of Girard v. FERC*, 790 F.2d at 925; *Hall v. FERC*, 691 F.2d at 1191-92 n. 13.

[23] These orders were expressly authorized in section 110(a)(2) of the Natural Gas Policy Act, 15 U.S.C. § 3320(a)(2).

Order No. 94 series proceedings, that during the 1980 to 1983 period between the issuance of Order No. 94, suspending applications for gathering and compression costs, and the issuance of Order No. 94-A, which effectively lifted that suspension,[24] they were not paying the full cost of the gas volumes they in turn purchased from the pipelines.[25]

In these circumstances, the consent of the pipelines' customers[26] must take a secondary position to the overriding public interest in the maintenance of orderly gas markets through the equitable allocation of costs.

Accordingly, under our equitable powers to fashion remedies effectuating fair results,[27] we conclude that it is necessary and appropriate in these proceedings, under setcion 4(d) of the Natural Gas Act, to waive the filed rate doctrine.

The Commission orders:

(A) For good cause shown, the notice requirement of section 4(d) of the Natural Gas Act, 15 U.S.C. § 717c(d),

---

[24] *See* n. 4, *supra.*

[25] Columbia was obviously aware of the implications of the Order No. 94 series. It participated in those proceedings before the Commission and before the 5th Circuit in the Texas Eastern litigation. *See* 769 F.2d at 1057.

[26] The court found that Order Nos. 94 and 94-A did not constitute notice to downstream purchasers sufficient to override the prohibition against retroactive ratemaking. 831 F.2d at 1140. We are, of course, bound by that finding. We do not believe, however, that in our analysis here of customers' consent to direct billing in the context of waiver of the filed rate doctrine we are prohibited thereby from acknowledging and taking into consideration that these customers were fully aware of the implications of the Order No. 94 series, including the 5th Circuit's upholding of these orders in the Texas Eastern litigation.

[27] *Columbia Gas Transmission Corp. v. FERC,* 750 F.2d at 109; quoted in n. 21, *supra.*

is waived with respect to the five applications for Commission approval of direct billing procedures in these proceedings.

(B) The orders previously issued by the Commission in these proceedings,[28] as clarified and supplemented by this order pursuant to the court's remand orders, shall be complied with and implemented.

Commissioner Langdon voted present.

---

[28] *See* n. 2, *supra*.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP85-148-008

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

Docket No. RP85-170-005

TEXAS EASTERN TRANSMISSION CORPORATION

Docket No. RP85-181-003

TEXAS GAS TRANSMISSION CORPORATION

Docket No. RP85-202-003

TRUNKLINE GAS COMPANY

Docket No. RP85-203-004

PANHANDLE EASTERN PIPE LINE COMPANY

ORDER DENYING REHEARING AND RECONSIDERATION

(Issued January 24, 1989)

Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon, Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

On November 1, 1988, the Commission issued its "Order on Remand Granting Waivers" in the five above-captioned proceedings.[1] In that order, the Commission, pursuant to

[1] 45 FERC ¶ 61,169 (1988).

its authority under section 4(d) of the Natural Gas Act,[2] granted waivers of the filed rate doctrine to the five pipeline companies named above, thereby permitting them to pass on to their purchasers under direct billing procedures certain retroactive production-related gathering and compression costs which the pipeline companies were required to pay their producers and suppliers pursuant to section 110(a)(2) of the Natural Gas Policy Act of 1978,[3] and the Commission's Order No. 94 series implementing that section.[4] The order describes the history of these proceedings as well as the Commission's Order No. 94 series proceedings.

Timely requests for rehearing of the Commission's November 1, 1988 order have been filed by Columbia Gas Transmission Corporation (Columbia), Michigan Consolidated Gas Company (Mich Con), and, jointly, Philadelphia Electric Company and Philadelphia Gas Works (Philadelphia). For the reasons set forth below, we are denying these requests for rehearing.[5]

The common argument raised on rehearing is that the Commission erred in granting waiver of the filed rate doctrine to the pipeline companies in the circumstances of these cases because the pipeline companies' purchasers never consented to the direct billing procedures for the retroactive production related gathering and compression costs. Absent such consent, assert the applicants for rehearing, the Commission is imposing a retroactive rate increase upon the customers of the pipeline companies in violation of the ban against retroactive ratemaking.[6]

---

[2] 15 U.S.C. § 717c(d) (1982).

[3] 15 U.S.C. § 3320(a)(2) (1982).

[4] *See* 45 FERC at p. 61,485 n. 4 (1988).

[5] On December 29, 1988, the Municipal Defense Group filed a motion for reconsideration raising the same objections as the applicants for rehearing. We will also deny that motion.

[6] *See Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 n. 8 (1981).

Mich Con asserts, further, that even if the Commission has the authority here to waive the filed rate doctrine, the necessary good cause, in the form of truly extraordinary circumstances warranting waiver, has not been demonstrated. In addition, Columbia asserts that since the Commission's decision to grant waivers here is inconsistent with its prior practice of permitting waiver only when the contracting parties agreed to a retroactive date, the Commission must acknowledge the change and substantiate the reason for the change and it has not done so here. Finally, Philadelphia argues that the Commission's "equitable powers to fashion remedies effectuating fair results" [7] can only be used in a manner consistent with the Natural Gas Act's ban on retroactive ratemaking, not to circumvent that ban.

In the November 1, 1988 order, we discussed the absence of agreement by the pipeline companies' customers and concluded that, in the circumstances of these cases, the consent of these customers must take a secondary position to the overriding public interest in the maintenance of orderly natural gas markets through the equitable allocation of costs.[8] We distinguished those cases [9] cited by the applicants for rehearing where good cause for waiver of the filed rate doctrine was found "only when the parties to the rate have agreed at some point in their negotiations on an effective date." [10]

In those cases, we stated, the rate changes had arisen out of private contracts and the Commission and courts were merely implementing the parties' mutual intentions

---

[7] 45 FERC at p. 61,488.

[8] We indicated that the magnitude of these costs for all producers approached $1.5 billion. *See* 45 FERC at p. 61,487 n. 17.

[9] *City of Girard v. FERC*, 790 F.2d 919 (D.C. Cir. 1986); *Hall v. FERC*, 691 F.2d 1184 (5th Cir. 1982); *City of Piqua v. FERC*, 610 F.2d 950 (D.C. Cir. 1979).

[10] *City of Girard v. FERC*, 790 F.2d at 925.

(or lack thereof) with respect to an effective date as expressed in their contracts. Furthermore, we indicated that in those cases not only was the public interest not opposed to such effectuation, but it was actually served by implementing the parties' expressed intentions in a manner consistent with the policies embodied in the Federal Power Act and the Natural Gas Act encouraging and protecting parties' rights to establish rates by individual contracts. We found, in summary, that in the particular circumstances of these cases, the equitable results from granting the waivers alone satisfied the good cause requirement under section 4(d) of the Natural Gas Act and so, acting pursuant to our equitable powers to fashion remedies effectuating fair results, we granted the waivers.[11]

While it is certainly true, as we stated in our order of November 1, 1988,[12] and as the applicants for rehearing have argued, that the Commission in the past has, with judicial approval, considered the good cause requirement of section 4(d) of the Natural Gas Act (and the equivalent section 205(d) of the Federal Power Act) to be satisfied in circumstances where the parties to a rate have agreed at some point in their negotiations on an effective date and the waiver is in the public interest,[13] we believe that the element of the parties' agreement was a product of the particular facts in those cases and does not alter the underlying principle that the Commission's satutory

---

[11] While customers' consent was lacking, we stated in our previous order that the customers, like Columbia, were fully cognizant, from their involvement in the Order No. 94 series proceedings, that during the 1980 to 1983 period between the issuance of Order No. 94, suspending applications for gathering and compression costs, and the issuance of Order No. 94-A, which effectively lifted that suspension, they were not paying the full cost of the gas volumes they in turn purchased from the pipelines. *See* 45 FERC at p. 61,488 and n. 26.

[12] 45 FERC at p. 61,487 n. 20.

[13] *E.g., City of Girard v. FERC,* 790 F.2d at 925.

authority to waive the filed rate doctrine for "good cause" rests upon equitable implementation of what we perceive to be in the public interest.[14]

In each of the cases relied upon for the proposition that the parties' consent is essential to a finding of good cause, the relevant agreement on an effective date for a rate was that between the parties in their original contract (or asserted contract) and each case arose, in the first place, because one of the parties to the original agreement had breached or otherwise failed to comply with its terms,[15] or was asserting that an agreement with respect to an effective date did in fact exist.[16] In each case, therefore, the parties' consent was a relevant factor only to the extent a private rate contract was all that was involved and only because, in such circumstances, the policies of the Federal Power and Natural Gas Acts encouraging and protecting parties rights to establish rates by individual contracts and the public interest in holding parties to their contractual agreements were both served thereby. In short, in these cases consent was a collateral element of the public interest; it was not, in and of itself, an essential element of good cause.[17] Consent, to our view, has never been a *sine qua non* for granting waivers. It is merely an incident in our determination of where the public interest lies.

---

[14] The underlying purpose of the Natural Gas Act is protection of the consumer. *See Atlantic Refining Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 388 (1959).

[15] *Hall v. FERC*, 691 F.2d 1184; *City of Piqua v. FERC*, 610 F.2d 950.

[16] *City of Girard v. FERC*, 790 F.2d 919.

[17] Since, as we indicated in our previous order (45 FERC at p. 61,488), it was unreasonable to expect agreement among the pipelines' many customers to reimburse the pipelines for their Order No. 94 costs, it clearly would not be in the public interest to permit just one such customer to refuse to agree and thereby distort the entire direct billing mechanism and, in the process, usurp the public interest.

Where, however, as is the case in the instant proceedings, requiring consent in order to grant the waivers would impede the otherwise overwhelming public interest in granting them,[18] consent is irrelevant.[19] Accordingly, we deny the requests for rehearing and the motion for reconsideration.

The Commission orders:

(A) The requests for rehearing filed by Columbia Gas Transmission Corporation, Michigan Consolidated Gas Company, and, jointly, Philadelphia Electric Company and Philadelphia Gas Works are denied.

(B) The motion for reconsideration filed by the Municipal Defense Group is denied.

---

[18] In our initial order here, we described the negative effects to the industry of not granting waivers in these proceedings. *See* 45 FERC at pp. 61,487-61,488.

[19] We do not, therefore, see this analysis as reflecting a change in policy as Columbia has asserted.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP88-203-000

PANHANDLE EASTERN PIPE LINE COMPANY

ORDER GRANTING AUTHORITY TO IMPLEMENT DIRECT BILLING PROCEDURE

(Issued July 29, 1988)

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon and Charles A. Trabandt.

On June 30, 1988, Panhandle Eastern Pipe Line Company (Panhandle) filed a petition for authority to institute a direct billing procedure to recover from its customers production-related costs pursuant to Order No. 473.[1] It also requests waivers of the Commission's regulations and the provisions of Panhandle's tariff as may be required to permit the use of the direct billing procedure.

Panhandle proposes to bill each jurisdictional customer directly for its pro rata share of specific Order No. 473 costs which have actually been paid by Panhandle to one of its producer-suppliers, Phillips 66 Natural Gas Company (Phillips), together with the appropriate interest calculated in accordance with the Commission's regula-

---

[1] Compression Allowances and Protest Procedures Under NGPA Section 110, Order No. 473, *FERC Statutes and Regulations* ¶ 30,747, *reh'g granted in part*, Order No. 473-A, *FERC Statutes and Regulations* ¶ 30,788 (1987).

tions. Panhandle proposes that the jurisdictional portion of the payment be allocated among its jurisdictional customers based on the proportion of sales to each customer during the period December 1, 1979 through December 31, 1984, to the total sales during that same period. This time frame corresponds to the period during which Panhandle paid the Order No. 473 amount to its producer-supplier.

Background

In Order No. 473, the Commission amended 18 C.F.R. § 271.1104 to permit first sellers of natural gas to collect allowances for the cost of fuel or power required to drive compression facilities upon which construction commenced prior to enactment of the NGPA. The Commission permitted producers to collect these amounts retroactively from August 10, 1987 back to July 25, 1980, or any earlier date on which the producer filed an application with the Commission to recover NGPA Section 110 production-related costs. Direct billing of certain compressor costs has previously been approved by the Commission.[2]

Description of the Filing

Panhandle proposes to collect by the direct billing procedure, $15,715,672.68 (including interest) from its jurisdictional customers. Panhandle states that the above amount is the jurisdictional portion of the compressor costs paid to its producer-supplier (Phillips) and proposes that these costs be allocated among its jurisdictional customers according to the ratio of each customer's total jurisdictional sales during the period December 1, 1979 through December 31, 1984, to the total sales during the same period. Panhandle filed tariff sheets[3] which set

---

[2] *See CNG Transmission Corp.*, 42 FERC ¶ 61,227 (1988): *National Fuel Gas Supply Corp.*, 43 FERC ¶ 61,283 (1988).

[3] Nineteenth Revised Sheet Nos. 3-C.1, 3-C.2 and 3-C.3 to FERC Gas Tariff, Original Volume No. 1.

forth the resulting amount allocated to each of its jurisdictional customers and requests an effective date of August 1, 1988 to implement the proposal.

In addition, Panhandle has supplied a schedule detailing how the allocation is to be accomplished and the individual customer sales data and resulting amounts of Order No. 473 costs. The schedule alsc shows the cost allocation between Panhandle's jurisdictional and non-jurisdictional sales customers of the total Order No. 473 payment.

Panhandle proposes to bill each customer on August 10, 1988, for the amount allocated to each customer, including interest. Each customer will have the option of paying its allocated amount in twelve monthly installments pursuant to the monthly billing procedures contained in Panhandle's tariff. Additional interest will be calculated if the customer chooses to pay in twelve monthly installments.

Because several of its firm sales contracts will expire prior to completion of the twelve month installment period, Panhandle requests that the Commission require that its customers' obligation to pay such amounts be extended until the amounts are paid in their entirety.

To account for the direct billing procedure, Panhandle proposes to establish a separate Account No. 191 sub-account. Panhandle will debit the sub-account with the Order No. 473 payments and would credit the amounts received from its customers under the direct billing procedure.

Panhandle maintains that the direct billing proposal is the most equitable and appropriate method of allocating such costs because it matches these costs to each customers' respective purchases during the period in which the costs were incurred. It contends that recovery of these payments through the normal PGA mechanism would be inappropriate because a customer could avoid its fair share of the costs by reducing future purchases.

Public Notice, Motions to Intervene and Protests

Public notice of Panhandle's filing was issued on July 7, 1988, providing for protests, motions or notices to intervene to be filed on or before July 14, 1988. Timely notices or motions to intervene were filed by the parties listed in Appendix A to this order. Pursuant to Rule 214 (18 C.F.R. § 385.214 (1987)) any timely filed motions to intervene are granted unless an answer in opposition is filed within 15 days of the date such motion is filed. Any timely filed motions or notices not listed in Appendix A are also granted in accordance with Rule 214.

Several parties filed petitions contesting Panhandle's direct billing proposal. Michigan Gas Storage Company (MGSC) requests that the proposed effective date of the proposal be suspended pending further investigation. MGSC states that it has several questions regarding the filing that should be resolved before the filing is accepted. Specifically, MGSC questions Panhandle's allocation of $2.02 million of these costs to MGSC, the circumstances surrounding the incurrence of Order No. 473 costs, and whether Panhandle has provided sufficient good cause to obtain a waiver of the Commission's regulations and the filed rate doctrine.

Columbia Gas Transmission Company (Columbia), Kansas Power and Light Company (KP&L), Michigan Consolidated Gas Company (MichCon), and Municipal Defense Group (MDG) oppose the direct billing proposal as violative of the filed rate doctrine and the prohibition against retroactive ratemaking.

Discussion

The Commission finds that Panhandle's direct billing proposal is an equitable and practical method of allocating cost responsibility for these past period Order No. 473 costs. Panhandle's proposal is similar to other Order No.

473 proposals which were accepted by the Commission.[4] While the Commission declined to adopt a general rule for the direct billing of compressor facility costs in Order No. 473, it stated that it would be receptive to filings by pipelines to implement direct billing mechanisms where appropriate.[5]

Appropriate circumstances are present in this case. The costs which Panhandle seeks to recover are nonrecurring out-of-period costs. An attempt to recover such costs through the PGA mechanism would allow customers to escape cost liability by reducing future purchases from Panhandle. The direct billing mechanism provides a fair and accurate method of allocating cost responsibility according to the purchases of Panhandle's customers during the period in which these costs were incurred.

The intervenors argue that acceptance of Panhandle's proposal will constitute a violation of the filed rate doctrine and the prohibition against retroactive ratemaking. The intervenors argue that it is a well established principle of ratemaking that natural gas customers cannot be retroactively assessed increased charges without prior notice.[6] In *Columbia*, the court found that direct billing mechanisms approved by the Commission under Order Nos. 94 and 94-A[7] could not be lawfully imposed without

---

[4] *See supra* note 2.

[5] Order No. 473 at p. 30,673.

[6] *Citing Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135 (D.C. Cir. 1987), *aff'd on rehearing*, 844 F.2d 879 (D.C. Cir. 1988); *see also Arkansas-Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981).

[7] Regulations Implementing Section 110 of the Natural Gas Policy Act of 1978 and Establishing Policy Under the Natural Gas Act, Order No. 94, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,178 (1980), *reh'g granted in part*, Order No. 94-A, *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,419, *modified*, Order No. 94-B, *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,421, *reh'g denied*,

proper notice. However, on rehearing of *Columbia*, the court affirmed that on remand the Commission was free to consider whether waiver of the filed rate doctrine is warranted in view of the magnitude of the costs at issue.[8]

Here, equity demands that Panhandle be granted a waiver of the notice requirement to permit implementation of the direct billing procedure which will allow Panhandle to collect production-related costs from those customers who caused their incurrence. Failure to grant a waiver under these circumstances would result in Panhandle having to absorb costs which its suppliers are expressly authorized to collect and which it is entitled to recoup from its customers. Furthermore, a pipeline's authorization to recover these costs does not restrict the rights of interested parties to contest the propriety of individual Order No. 473 payments. Since the protest procedure gives both pipelines and their customers the opportunity to challenge the authority of gas suppliers to collect these costs, the Commission does not believe that a notice requirement is also necessary to protect customers.

Accordingly, the direct billing proposal submitted by Panhandle is approved subject to the following conditions:

(A) Panhandle is required to identify the specific contracts with Phillips to which the Order No. 473 costs pertain.

Order No. 94-C, *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,454, *reh'g denied*, Order No. 94-D, 23 FERC ¶ 61,279, *clarified*, Order No. 94-E, *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,528 (1983), *clarified further*, Order No. 94-F, *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,654, *reh'g denied*, Order No. 94-G, 32 FERC ¶ 61,433 (1985). Order No. 94-A was affirmed in part in *Texas Eastern Transmission Corp. v. FERC*, 769 F.2d 1053 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 1967 (1986). The rulemaking proceeding that culminated in the issuance of Order No. 473 originated as a consequence of the court's remand in the Texas Eastern case.

[8] Columbia, 844 F.2d at 880; *see generally City of Piqua, Ohio v. FERC*, 610 F.2d 950 (D.C. Cir. 1979).

(B) Panhandle is required to provide workpapers detailing its calculation of the amount to be charged its customers and the specific cost allocation to each customer.

(C) Panhandle is required to state the date that it first received a billing for Order No. 473 costs from Phillips, and to explain the reason for Panhandle's delay in filing to recover these costs.

In addition, the Commission shall require that any customer who elects to pay its direct billed costs over a twelve-month installment period be charged additional interest calculated in accordance with section 154.102(c) of the Commission's regulations.[9]

The Commission orders:

(A) Panhandle's tariff sheets listed in footnote 3 of the order are accepted for filing subject to the conditions contained in the order.

(B) Waiver of the Commission's regulations and of Panhandle's tariff is granted to the extent necessary to effectuate the direct billing procedure.

---

[9] 18 C.F.R. § 154.102(c) (1987).

APPENDIX A

Citizens Gas & Coke Utility

Missouri Public Service Division of Utilicorp United, Inc.

Northern Indiana Public Service Company

Illinois Commerce Commission

Illinois Power Company

General Service Customer Group

East Ohio Gas Company

Indiana Gas Company

Michigan Gas Storage Company*

Michigan Consolidated Gas Company*

Kansas Power & Light Company*

Municipal Defense Group*

Columbia Gas Transmission Corporation*

---

* Denotes parties that have also protested filing.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP88-203-001

PANHANDLE EASTERN PIPE LINE COMPANY

NOTICE OF DENIAL OF REHEARING
BY OPERATION OF LAW

(Issued September 21, 1988)

Lois D. Cashell, Acting Secretary.

On August 26, 1988, Columbia Gas Transmission Corporation and Michigan Consolidated Gas Company filed requests for rehearing of the Commission's order in the above-captioned docket issued on July 29, 1988.[1] On August 29, 1988, Municipal Defense Group filed a request for rehearing of the July 29 order. That order granted Panhandle Eastern Pipe Line Company waiver of the Commission's notice requirement and approved the implementation of a direct billing procedure to recover from its customers production related costs pursuant to Order No. 473.[2]

Take notice that the Commission determined to take no action on the requests for rehearing. Accordingly, the requests for rehearing are denied by operation of law pursuant to Rule 713(f) of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.713(f)).

---

[1] 44 FERC ¶ 61,173 (1988).

[2] Compression Allowances and Protest Procedures Under NGPA Section 110, Order No. 473, *FERC Statutes and Regulations* ¶ 30,747, *reh'g granted in part*, Order No. 473-A, *FERC Statutes and Regulations* ¶ 30,788 (1987).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 85-1846, 85-1847, 86-1021, 86-1074,
86-1082, 86-1164 and 86-1187

COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

PUBLIC SERVICE ELECTRIC AND GAS COMPANY, PHILADELPHIA GAS WORKS, PHILADELPHIA ELECTRIC COMPANY, BAY STATE GAS COMPANY, *et al.*,
Intervenors.

Petitions for Review of Orders of the
Federal Energy Regulatory Commission

Argued Dec. 15, 1986

Decided Oct. 27, 1987

Richard L. Gottlieb, Charleston, W.Va., for petitioner Columbia Gas Transmission Corp. in Nos. 85-1846, 85-1847, 86-1074, 86-1082 and 86-1164. Steve H. Finch, G.D.H. Snyder, and S.J. Small, Charleston, W.Va., entered appearances for Columbia Gas Transmission Corp.

Philip B. Malter, with whom Charles F. Wheatley, Jr., Annapolis, Md., and Paul M. Flynn, Washington, D.C.,

were on the brief, for petitioner Mun. Defense Group in No. 86-1187.

Michael J. Fremuth, with whom Thomas F. Ryan, Jr., and Robert G. Hardy, Washington, D.C., were on the brief, for Transcontinental Gas Pipe Line Corp., petitioner in No. 86-1021 and intervenor in No. 85-1847; and on the joint brief for intervenor pipelines, with Bolivar C. Andrews, Carl W. Ulrich, Judy M. Johnson, and J. Stephen Martin, Houston, Tex., for intervenor Texas Eastern Transmission Corp.; William Douglas Field, Jr., Owensboro, Ky., and Michael R. Waller, Houston, Tex., for intervenor Texas Gas Transmission Corp.; Raymond N. Shibley, Lawrence G. Acker, and Patrick J. Whittle, Washington, D.C., for intervenors Trunkline Gas Co. and Panhandle Eastern Pipe Line Co. Thomas R. Sheets, Houston, Tex., also entered an appearance for intervenor Texas Eastern Transmission Corp.

John H. Conway, Atty., F.E.R.C., for respondent. Barbara J. Weller, Sol., and A. Karen Hill, F.E.R.C., Washington, D.C., were on the brief, for respondent.

Glenn W. Letham and Joshua L. Menter, Washington, D.C., were on the brief, for intervenor Memphis Light, Gas & Water Div. in No. 86-1074.

John Sandor, Washington, D.C., was on the brief for amicus curiae The Nat. Ass'n of Consumer Owned Gas Systems, urging reversal.

Frank P. Saponaro, Jr. and Jennifer K. Walter, Washington, D.C., entered appearances for intervenor Philadelphia Gas Works.

James R. Lacey, Newark, N.J., entered an appearance for intervenor Public Service Elec. and Gas. Co.

Robert A. MacDonnell, Philadelphia, Pa., entered an appearance for intervenor Philadelphia Elec. Co.

John S. Schmid, Washington, D.C., entered an appearance for intervenors Bay State Gas Co., et al.

John E. Holtzinger, Jr., John T. Stough, Jr., and Jacolyn A. Simmons, Washington, D.C., entered appearances for intervenor Atlanta Gas Light Co.

Stanley M. Morley, Joel F. Zipp, and Paul W. Diehl, Washington, D.C., entered appearances for intervenor South Carolina Pipeline Corp.

Nusha Wyner, Newark, N.J., Stanley W. Balis, and Susan N. Kelly, Washington, D.C., entered appearances for intervenor Public Advocate of New Jersey.

Frank H. Strickler and Gordon M. Grant, Washington, D.C., entered appearances for intervenor Washington Gas Light Co.

David E. Blabey, Albany, N.Y., Richard A. Solomon, and David D'Alessandro, Washington, D.C., entered appearances for intervenor Public Service Com'n of the State of N.Y.

Jerry W. Amos, Greensboro, N.C., entered an appearance for intervenor Piedmont Natural Gas Co., Inc.

William W. Ross and Daniel L. Koffsky, Washington, D.C., entered appearances for intervenor Consumers Power Co.

James H. Holt and Jeffrey M. Petrash, Detroit, Mich., entered appearances for intervenor Michigan Consol. Gas. Co.

John R. Schaefgan, Jr. and Richard M. Merriman, Washington, D.C., entered appearances for intervenors General Customer Service Group, et al.

Before BUCKLEY and WILLIAMS, Circuit Judges, and GERHARD A. GESELL,* U.S. District Judge for the District of Columbia.

Opinion for the Court filed by Circuit Judge BUCKLEY.

---

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

BUCKLEY, Circuit Judge:

Petitioners challenge Federal Energy Regulatory Commission orders permitting five pipelines to recover a surcharge from their customers on gas already sold to them. The amount of the surcharge would, in effect, reimburse the pipelines for the amounts that the pipelines had subsequently been required to pay to producers for certain deferred production-associated costs. The principal issue in these cases is the propriety, under the governing statutes, of such a surcharge.

We conclude that the Commission exceeded its authority when, without proper notice, it approved what in effect were retroactive increases in the price of natural gas previously sold by the pipelines to their customers.

I. Background

Under the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717-717w (1982), natural gas companies are required to keep on file with the Federal Energy Regulatory Commission ("FERC" or "Commission") "schedules showing all rates and charges for any transportation or sale [of natural gas] subject to the jurisdiction of the Commission." 15 U.S.C. § 717c(c) (1982). Under the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301-3432 (1982), Congress established ceiling prices for "first sales" (typically sales by producers to pipeline companies ("first purchasers")) of various categories of natural gas. 15 U.S.C. §§ 3312-3319 (1982). In section 110 of the NGPA, Congress permitted natural gas producers to charge for certain production-related costs in excess of the ceiling prices established under the NGPA:

> [A] price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this part if such first sale price exceeds the maxi-

mum lawful price to the extent necessary to recover.—

* * * *

(2) any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission.

15 U.S.C. § 3320(a) (1982).

Upon enactment of the NGPA, the Commission immediately issued, and at the same time sought public comment on, interim regulations to implement section 110. Interim Regulations Implementing the Natural Gas Policy Act of 1978 §§ 271.101-271.1106, 43 Fed.Reg. 56,448, 56,552-77 (1978). The Interim Regulations did not implement every provision of the NGPA, but merely proposed guidelines to deal with those areas demanding the most immediate attention. *Id.* at 56,452. Part 271 of the Interim Regulations specified the maximum lawful prices applicable to first sales of natural gas. *Id.* at 56,-552. Subpart K prescribed "regulations under which a price for a first sale of natural gas shall not be considered to exceed the applicable maximum lawful prices set forth in Part 271 if such first sale price exceeds the maximum lawful price to the extent necessary to recover . . . production related costs approved by order of the Commission under § 271.1105." *Id.* at 56,574.

In 1980, FERC amended Subpart K to, *inter alia*, (1) allow sellers of committed or dedicated natural gas under the NGPA to apply for production-related costs in excess of NGA allowances, (2) permit certain sellers of natural gas to collect NGA allowances without applications, and (3) provide for a new category of production-related costs ("other costs"). Order No. 94: Order Amending Interim Regulations Under the Natural Gas Policy Act of 1978 and Establishing Policy Under the Natural Gas Act, 45 Fed.Reg. 53,099 (1980).

In the same order, the Commission announced that it would not accept applications for "compression costs" until the Commission completed proceedings to determine an appropriate generic allowance:

> Compression is perhaps the single most complex cost category which we must consider for a production-related add-on. First, of the activities specifically listed under section 110, compression, more than any other, can be undertaken as a production or non-allocable activity. Second, no standard or prevailing industry practice now exists for determining the costs of compression. This means that a seller seeking to add-on compression costs must make a showing as to the costs incurred and the type of compression undertaken. If this must be done case-by-case for each seller there is a potential for long delay and inconclusive results. Rather than this approach (which was the approach of the interim regulations issued in December 1978), we believe that an appropriate allowance for compression can be determined which would apply for specific kinds of compression. To this end we will inaugurate a generic proceeding to determine the appropriate allowance. . . . During the pendency of the proceeding, in our exercise of discretion, we will accept no applications for compression costs.

Id. at 53,107 (footnote omitted). The Commission initiated the same kind of proceeding to establish an appropriate generic allowance for "gathering costs." *Id.* at 53,108. The Commission assured first sellers that a "retroactive collection procedure will be provided under which the allowance for compression [and gathering] costs determined under the generic rulemaking will be applied to costs incurred with respect to gas delivered on or after the effective date of this Rule if collection of such costs is contractually authorized." *Id.* at 53,107 (footnote omitted).

In the meantime, first purchasers of the gas had recourse to an existing method for recovering these additional estimated costs from their customers; namely, a system of *prospective* charges called "purchased gas adjustment clauses" ("PGA clauses"). 18 C.F.R. § 154.38(d)(4) (1987). PGA clauses, like rates, must be filed with and approved by the Commission before being put into effect. Proposed PGA clauses must also be accompanied by cost studies "based upon actual costs for the 12 months of most recently available actual experience." 18 C.F.R. § 154.38(d)(4)(i). This mechanism thus permits pipelines to recover through prospective sales, on the basis of reasonably current calculations, the fluctuating production-related costs they are required to reimburse producers.

In 1983, the Commission issued Order Nos. 94-A, 48 Fed.Reg. 5,152 (1983), and 94-B, 48 Fed.Reg. 5,190 (1983), containing its long-promised regulations addressing generic compression and gathering cost allowances. These orders authorized natural gas producers to recover retroactively from first purchasers the costs incurred by the producers in the delivery and compression of natural gas ("deferred costs") delivered to the pipelines prior to March 7, 1983 (the effective date of Order Nos. 94-A and 94-B), but after July 25, 1980 (the effective date of Order No. 94) or the date on which the producer filed an application with the Commission for reimbursement of the deferred costs, whichever was earlier. 18 C.F.R. § 271.1104(e) (1987).

A number of first purchaser pipeline companies sought to pass these costs on to their customers ("downstream purchasers"). To this end, they petitioned FERC for permission to bill their customers directly for the customers' pro-rata shares of these deferred expenses, such billing to take the form of a surcharge for gas purchased by each customer during the three-year period between the issuance of the interim order (Order No. 94) and the final orders (Order Nos. 94-A and 94-B). In five cases,

the Commission issued orders * granting pipeline companies permission to do so. The "direct billing" method for reimbursement is described in the proposal submitted by Transcontinental Gas Pipeline Corp. ("Transco") and approved by the Commission. Under its terms, Transco undertook

> to calculate each customer's share of the retroactive allowances based on each customer's actual purchases during each month to which the retroactive allowances apply. Each customer's total amount due, plus interest, will then be billed and paid in equal installments over a twelve-month period, or paid in a single lump-sum payment at the customer's option.

32 F.E.R.C. ¶ 61,230 at 61,543. Thus, in contrast with the prospective PGA clause mechanism, the direct billing procedure was designed to provide pipelines with a method for recovering retroactively, through a system of surcharges, the amounts the Commission determined they were required to reimburse producers for production-associated costs that had accrued during the three-year period.

Petitioners have appealed each of the five orders. Columbia Gas Transmission Corp. and the Municipal Defense Group (representing a number of distribution companies that purchase natural gas from pipeline companies) challenge the legality of direct billing on the ground that it constitutes retroactive ratemaking prohibited by the Natural Gas Act. Columbia Gas also asserts that the direct billing procedure is inconsistent with FERC's own

---

* *Transcontinental Gas Pipe Line Corp.* ["*Transco*"], 32 F.E.R.C. ¶ 61,230, *reh'g and clarification denied*, 33 F.E.R.C. ¶ 61,213 (1985); *Texas Eastern Transmission Corp.*, 32 F.E.R.C. ¶ 61,493, *reh'g denied*, 33 F.E.R.C. ¶ 61,257 (1985); *Texas Gas Transmission Corp.*, 33 F.E.R.C. ¶ 61,032, *reh'g denied*, 33 F.E.R.C. ¶ 61,359 (1985); *Panhandle Eastern Pipe Line Co.*, 33 F.E.R.C. ¶ 61,218 (1985), *reh'g denied*, 34 F.E.R.C. ¶ 61,231 (1986); and *Trunkline Gas Co.*, 33 F.E.R.C. ¶ 61,217 (1985), *reh'g denied*, 34 F.E.R.C. ¶ 61,021 (1986).

precedent, and that the PGA clause mechanism is the only method (aside from filing for rate increases) that is authorized for recovering such additional expenses.

The Commission, supported by various intervening pipeline companies, defends its approval of the direct billing procedure on the basis of its equitable results, as it would require customers to pay the actual cost of the gas they have purchased. The Commission also argues that its orders do not constitute retroactive rulemaking because the Commission's 1980 and 1983 orders provided adequate notice that the deferred costs would be passed along to the pipelines and their customers.

Although Transco supports the concept of direct billing, it challenges FERC's decision to apply a different rate of interest on amounts previously collected under PGA clauses that Transco must now refund to customers and the rate it may apply in calculating the total amount to be recovered from them through direct billing. The Commission has admitted that its consideration of this issue was based on error and, on November 24, 1986, it moved that we remand this one issue for further consideration.

II. Analysis

A. *The Rule Against Retroactive Ratemaking*

Both Columbia and the Municipal Defense Group challenge direct billing as constituting retroactive ratemaking and therefore contrary to law. The Commission defends its decisions to allow pipeline companies to directly bill their customers for deferred production-related expenses on the basis of an equitable result:

> "The Commission . . . determined that allocating these costs to the pipelines' customers on the basis of volumes purchased at the time the costs were incurred "will equitably bill customers for the higher amounts they should have paid based on actual purchases during the past billing periods." This is a

> sound reason for adopting the direct billing method; thus the Commission's choice of that method is rationally based.

Brief for Commission at 13 (quoting *Transco, reh'g and clarification denied*, 33 F.E.R.C. ¶ 61,213 at 61,443); *see also, e.g., Transco*, 32 F.E.R.C. ¶ 61,230 at 61,543 ("[Transco's proposal] is administratively effective, equitable, and meets our concern that pricing signals not be distorted by the influx of substantial retroactive Order No. 94-A costs. Above all, it will break up the logjam that has existed and permit a relatively speedy passthrough of long overdue cost responsibility."). The Commission further argues that "Order Nos. 94 and 94-A put everyone on notice that these compression and gathering costs would be retroactively collected, once the Commission determined the appropriate method and dollar amount." Brief for Commission at 14 (citing *Transco*, 32 F.E.R.C. ¶ 61,230 at 61,544-45, and 33 F.E.R.C. ¶ 61,213 at 61,443).

Although the parties have mounted an extensive semantic battle over whether the FERC orders amount to retroactive ratemaking (or rate authorization), the effect of the orders is quite clear: downstream purchasers are expected to pay a surcharge, over and above the rates on file at the time of sale, for gas they had already purchased. However described, this constitutes a retroactive rate increase that we find to be prohibited by the NGA. While that prohibition might have been overridden through adequate notice that purchasers would be expected to pay the deferred charges at a later date, Order Nos. 94 and 94-A did not constitute such notice. Because they were addressed exclusively to *first sales* of natural gas, they cannot be deemed to have placed downstream purchasers on notice that they in turn would be expected to absorb those costs through a system of surcharges collected after the fact. Thus there is no support for the Commission's assertion that its orders "put *everyone* on notice."

The rule against retroactive ratemaking is derived from the provisions in the NGA requiring sellers of natural gas to file their rates with the Commission and defining its authority to modify them. The pertinent statutory language reads as follows:

> Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, . . . and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sales subject to the jurisdiction of the Commission. . . .

15 U.S.C. § 717c(c).

> [T]he Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company. . . .

15 U.S.C. § 717d(a).

These provisions form the basis for the "filed rate doctrine." In its discussion of the doctrine in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 576-78, 101 S.Ct. 2925, 2929-30, 69 L.Ed.2d 856 (1981), the Supreme Court notes that

> the [Natural Gas] Act bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and prevents the Commission itself from imposing a rate increase for gas already sold.

Id. at 578, 101 S.Ct. at 2931. Moreover, the Court explicitly states, in a footnote, that "the Commission may not *impose* a retroactive rate alteration and, in particular, may not order reparations. . . ." *Id.* at n. 8 (emphasis in original) (citing *FPC v. Sunray DX Oil Co.*,

391 U.S. 9, 24, 88 S.Ct. 1526, 1534, 20 L.Ed.2d 388 (1968)).

We have recently had occasion to explain, in the case of electrical utilities, the rationale for prohibiting retroactive increases in filed rates:

> The wholesale purchasers of electricity cannot plan their activities unless they know the cost of what they are receiving, particularly if they are retailers, who must calculate their appropriate resale rates, . . . but also if they are large-scale purchaser-users. Providing the necessary predictability is the whole purpose of the well established "filed rate" doctrine, which "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority."

Electrical Dist. No. 1 v. FERC, 774 F.2d 490, 493 (D.C. Cir.1985) (quoting *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577, 101 S.Ct. 2925, 2930, 69 L.Ed.2d 856 (1981)). Although FERC claims that "Order Nos. 94 and 94-A gave notice that the prices paid for gas during the pendency of the Commission's rulemaking were not final prices," Brief for Commission at 16, the orders were explicitly concerned with *first sales*. Furthermore, even in that context, the Commission was careful to limit the application of Order No. 94-A to those cases in which first purchasers were contractually bound to pay the deferred costs.

> As a general matter, the final rules will not operate to authorize the collection of amounts for production-related costs incurred prior to today. A basic principle of administrative procedure is that rules should operate prospectively only. We see no reason to depart from this principle in implementing these amendments. To the contrary, there is good reason to adhere to it.

48 Fed.Reg. at 5,161. In a footnote to the above-quoted section, the Commission stated:

> An exception is made in the case of delivery or compression services. However, this exception is based upon the Commission's notice in Order No. 94 that these costs could be recovered. In addition, this recovery is under particular safeguards to insure that amounts collected for these services may only be collected *if contractual authority existed to collect them at the time they were incurred.*

Id. at n. 89 (emphasis added); *see* 18 C.F.R. § 271.1104 (c)(4)(ii). It is thus clear that the notice provided by the two orders was limited to a highly restricted audience.

Furthermore, contrary to what the Commission suggests, Brief for Commission at 16 n. 10, notice may not be imputed as a result of the "passthrough" provision in section 601 of the NGPA, 15 U.S.C. § 3431(c). While section 601 permits a pipeline to recover any amount paid for natural gas that "is deemed to be just and reasonable for purposes of sections 4 and 5 of [the NGA]," *id.* § 3431(c)(2)(A), we read nothing in the language of the section to warrant a resort to retroactive as opposed to prospective rate increases.

We need not address whether the Commission might have accomplished the goal of permitting pipelines to pass these costs on to their customers (in proportion to their takes in the three-year period following Order No. 94) through a system of specific PGA clauses for each account because that issue is not before us. *See* Brief for Commission at 20. Such a device, in any event, would differ significantly from that selected by the Commission, as it would allow all surcharged customers to plan accordingly and would enable those with access to more than one pipeline to respond to the surcharges by reducing purchases from the pipeline(s) imposing the highest

additional costs. Nor need we determine whether the Commission, in order to avoid unjust enrichment, might "have ordered pipelines to begin collecting production-related cost surcharges at the time of issuance of Order No. 94, subject to adjustment when Order No. 94-A specified the exact production-related cost allowances." Joint Brief for Intervenor Pipelines at 22 (citing *Kansas Cities v. FERC*, 723 F.2d 82, 93 (D.C.Cir.1983)). As none of the parties has demonstrated that proper notice was afforded to pipeline customers that they might be subject to a surcharge on past purchases, we decline to address this hypothetical issue.

B. *Prior FERC Precedent*

Columbia Gas argues also that the Commission's decision to permit direct billing for deferred expenses is inconsistent with prior Commission opinions, orders, and regulations, and that the Commission failed to provide an adequate explanation of why it departed from its prior rulings. Because we hold the Commission acted beyond its authority in approving the direct billing of deferred costs, we need not decide whether its explanation of its alleged departure from past practice was sufficiently reasonable.

C. *The Interest Decision*

Transco argues that it is being penalized in the amount of almost a million dollars by the FERC order allowing direct billing because it is required to pay customers a higher rate of interest on amounts it is required to refund from past PGA clause collections than it is allowed to charge those same customers on their shares of directly billed deferred costs. Because we find the FERC orders allowing direct billing to be *ultra vires*, the question of the interest differential is moot. Accordingly, we deny the Commission's November 24, 1986 motion to remand that issue for further consideration.

III. CONCLUSION

The five orders on review violate the NGA's prohibition against retroactive ratemaking. We therefore strike the orders authorizing direct billing and remand to the Commission for further proceedings consistent with this opinion.

So ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 85-1846, 85-1847, 86-1021, 86-1074,
86-1082, 86-1164 and 86-1187

COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

April 22, 1988

Catherine C. Cook, Gen. Counsel, Jerome M. Feit, Sol., and John H. Conway, Atty., F.E.R.C. ("FERC"), Washington, D.C., were on respondent's petition for rehearing and suggestion for rehearing en banc and FERC's supplemental brief in response to court's February 23, 1988 order.

Raymond N. Shibley and Marlene L. Stein, Washington, D.C., were on the petition for rehearing and suggestion for rehearing en banc, for intervenors Panhandle Eatsern Pipe Line Co. and Trunkline Gas Co. and intervenors' memorandum brief in response to court's order.

Thomas F. Ryan, Jr., Robert G. Hardy, and Michael J. Fremuth, Washington, D.C., for Transcontinental Gas Pipe Line Corp., and William Douglas Field, Jr., Owensboro, Ky., for Texas Gas Transmission Corp., were on the petition for rehearing and suggestion for rehearing en banc and the pipelines' joint supplemental brief in response to court's order.

Richard L. Gottlieb, Giles D.H. Snyder, and S.J. Small, Charleston, W.Va., were on the supplemental brief, for petitioner Columbia Gas Transmission Corp.

Charles F. Wheatley, Jr., Annapolis, Md., and Philip B. Malter, Washington, D.C., were on the brief in response to court's order for Municipal Defense Group.

Before BUCKLEY and WILLIAMS, Circuit Judges, and GESELL,* U.S. District Judge for the District of Columbia.

Opinion PER CURIAM.

ON PETITIONS FOR REHEARING

PER CURIAM:

The Federal Energy Regulatory Commission ("FERC") and various intervenor pipelines have petitioned this court for a rehearing of *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135 (D.C.Cir.1987). They assert that our decision notwithstanding, FERC has the implied authority under section 4(d) to waive the "filed rate" doctrine. 15 U.S.C. § 717c(d), *see generally City of Piqua, Ohio v. FERC*, 610 F.2d 950 (D.C.Cir.1979). Because the issue had not been argued on appeal, we directed the parties to submit supplemental briefs addressing the following question:

> Can the court properly consider and decide, at this time, the question of waiver of the "filed rate doctrine," the issue not having been explicitly raised and fully briefed by the parties previously?

Order of Feb. 23, 1988.

In its supplemental brief, FERC asserts that the section 4(d) waiver issue "crystallized" only after this court concluded that ratepayers had been provided with "inadequate notice to warrant lawful retroactive ratemaking."

---

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

Supplemental Brief for Respondent at 6. Accordingly, the Commission urges that we exercise our authority to consider the issue on rehearing in light of the impact of our decision on the public interest, citing *Consumers Union v. FPC*, 510 F.2d 656, 661-62 (D.C.Cir.1974). Supplemental Brief for Respondent at 6-7.

In *Consumers Union*, we noted our authority to consider arguments on rehearing that were not raised in the briefs or oral argument. "Our willingness to [entertain new arguments] rests on a balancing of considerations of judicial orderliness and efficiency against the need for the greatest possible accuracy in judicial decisionmaking. The latter factor is of particular weight when the decision affects the broad public interest." *Id.* at 662.

In view of the magnitude of the costs at issue in this case, we are persuaded that we can best serve that interest by leaving our remand order in place and affirming that FERC is free to consider the waiver issue and determine whether it may issue new orders on grounds consistent with the principles enunciated in our earlier opinion in this case.

So ordered.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. RP85-148-000,* TA85-3-29-000
and TA85-3-29-002

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

ORDER GRANTING PETITION TO INSTITUTE DIRECT BILLING PROCEDURE FOR RETROACTIVE PRODUCTION-RELATED COST ALLOWANCES WITH CONDITIONS, REJECTING COMPLIANCE TARIFF FILING AND RELATED MOTION AS MOOT, AND GRANTING WAIVERS

(Issued August 15, 1985)

Before Commissioners: Raymond J. O'Connor, Chairman; A. G. Sousa and Charles G. Stalon.

By this order, we grant, with certain conditions, a petition filed on May 22, 1985, by Transcontinental Gas Pipe Line Corporation (Transco) to institute a special procedure to directly bill its customers for about $127 million in "retroactive" production-related cost allowances it asserts it has paid or will soon pay its natural gas suppliers. These allowances are authorized under section 110(a)(2) of the Natural Gas Policy Act of 1978 (NGPA)[1] and section 271.1104[2] of the Commission's NGPA rules. Ac-

---

* Not consolidated.

[1] 15 U.S.C. § 3320(a)(2).

[2] 18 C.F.R. § 271.1104 (1984).

cording to Transco, they relate to natural gas that Transco purchased in NGPA first sales during the period July 25, 1980, through August 31, 1984. Transco proposes to allocate these costs to those of its customers who actually benefitted from the production-related services performed during that period and then to directly bill these amounts in twelve roughly equal monthly installments. The customers would also have the option to make a single lump-sum payment. This procedure would replace Transco's present purchased gas adjustment (PGA) method of flowing through retroactive production-related costs in its rates.

In this order, we also reject as moot certain tariff sheets Transco filed on May 31, 1985, in purported compliance with our April 30, 1985 PGA suspension order issued in Docket No. TA85-3-29-000, *et al.*[3] The proposed tariff sheets would have implemented recovery of a portion of these production-related cost allowances through the existing PGA provisions of Transco's tariff. In addition, we will direct that Transco provide a more detailed explanation of its gas purchasing programs in order to comply with Ordering Paragraph (C) of our April 30th order.

Interventions and Protests

Public notice of Transco's petition was issued in Docket No. RP85-148-000 on May 28, 1985, providing for protests, motions, or notices to intervene to be filed on or before June 6, 1985. The persons listed in Appendix A to this order filed timely motions or notices to intervene in Docket No. RP85-148-000. In addition, notice of Transco's May 30, 1985 compliance filing in Docket No.

---

[3] *Transcontinental Gas Pipe Line Corp.*, 31 FERC ¶ 61,129 (1985). On May 30, 1985, Transco also filed a motion for clarification of Ordering Paragraph (C) of our April 30th order and a request for stay of the effectiveness of its revised tariff sheets filed May 31, 1985 in Docket No. TA85-2-29-002. We will also reject that motion in this order.

TA85-3-29-002 was issued on June 5, 1985, providing for protests, motions, or notices to intervene to be filed on or before June 12, 1985. Appendix B lists persons who filed timely motions or notices to intervene in Docket No. TA85-3-29-002. Pursuant to Rule 214 [4] any timely filed motions to intervene are granted unless an answer in opposition is filed within 15 days of the date such motion is filed. Any timely filed motions or notices not listed in the appendices are also granted in accordance with the conditions of Rule 214.

Five persons filed motions to intervene out of time in Docket No. RP85-148-000: Piedmont Natural Gas Company (Piedmont), Conoco, Inc. (Conoco), Long Island Lighting Company (Long Island), Elizabethtown Gas Company (Elizabethtown), and the Pennsylvania Public Utility Commission (Pennsylvania PUC). Long Island and Pennsylvania PUC each filed a motion to intervene out of time in Docket No. TA85-3-29-002.

In determining if good cause has been shown to permit a late intervention, the Commission may consider the following factors: whether (1) the movant had good cause for failing to file the motion within the time prescribed; (2) any disruption of the proceeding might result from permitting the intervention; (3) any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; (4) the motion conforms to the requirements of paragraph (b) of Rule 214; and (5) the movant's interest is not adequately represented by other parties in the proceeding.

In their respective motions, each of the late movants has established an interest in this proceeding. At this early stage of the proceeding, other parties will not be prejudiced by granting their requests for intervention. Accordingly, the Commission finds that good cause exists to permit the late interventions.

---

[4] 18 C.F.R. § 385.214 (1984).

Ten persons filed protests or requests for hearing in Docket No. RP85-148-000: Public Advocate of New Jersey (Public Advocate), Brooklyn Union Gas Company (Brooklyn Union), South Jersey Gas Company (South Jersey), Washington Gas Light Company and Frederick Gas, Inc. (jointly, WGL), Columbia Gas Transmission Corporation (Columbia), Public Service Electric and Gas Company (PSE&G), North Carolina Natural Gas Corporation (NCNG), and Piedmont. Public Advocate, WGL and PSE&G also filed protests in Docket No. TA85-3-29-002. Finally, on June 14, 1985, WGL filed an answer in opposition to Transco's motion for clarification and stay filed May 30, 1985 in Docket No. TA85-3-29-000, *et al.*

Transco's Direct Billing Proposal

According to Transco, its petition is part of a two-pronged effort to, first, clean up a large, outstanding liability for "retroactive" production-related cost allowances it owes its producer-suppliers and, second, recoup all of these payments from its customers without being inequitable or sending inaccurate price signals in the process. The first part involves verifying the accuracy of the invoiced allowances and then paying producer-suppliers the verified amounts.[5] The second part is a direct billing procedure whereby Transco will recoup these payments from its customers in twelve monthly installments rather than through the PGA.

Transco refers to the allowances that it intends to directly bill as "retroactive Order No. 94 payments" in

---

[5] At this juncture, Transco reports that it has verified and already paid about $90 million in these allowances and that it expects the total to reach its estimate of $127.7 million. According to Transco, there may be differences between what is invoiced and what is the appropriate amount. It will only pay the amount it verifies. We will discuss this aspect of its proposal later in response to several of the protests, and only note here that the fact that such differences may result does not persuade us to reject the proposal.

order to distinguish them from "current" Order No. 94 payments that it has been paying.[6]

With regard to "current" payments, Transco has been using its PGA to pass the cost of the allowances it has actually paid through to its customers.[7] Now, because of the large liability still outstanding, and because of what Transco asserts are the "inequities and undesirable market distortions inherent in recovering retroactive Order No. 94 costs through PGA filings," it seeks to implement its proposed direct billing procedure. The company asserts that direct billing will be more equitable to its customers than PGA passthrough because it will be able to match the production-related costs incurred in prior periods with actual purchases of its customers during those same prior periods.

Transco notes that numerous customers on its system are now purchasing at much lower levels than during the period when the production-related costs were incurred. Therefore, according to Transco, those customers would be assessed substantially less than their equitable portion of cost responsibility related to those periods. Further,

---

[6] Order No. 94, *FERC Statutes and Regulations, Regulations Preambles 1977-1981*, ¶ 30,178 (1980); Order No. 94-A, *FERC Statutes and Regulations* ¶ 30,419 (1983); Interim Rule, Docket Nos. RM80-73-000 and RM80-74-000, *FERC Statutes and Regulations* ¶ 30,420 (1983); Order No. 94-B, *FERC Statutes and Regulations* ¶ 30,421 (1983); Order No. 94-C, *FERC Statutes and Regulations* ¶ 30,454 (1983); Order No. 94-D, 23 FERC ¶ 61,280 (1983); Order No. 333, Regulations Implementing Refund Procedures Under Subpart K of Part 271 for Production-Related Costs, Docket No. RM83-6-000, *FERC Statutes and Regulations* ¶ 30,494 (1983); Order No. 334, *FERC Statutes and Regulations* ¶ 30,495 (1983); Order No. 334-A, 25 FERC ¶ 61,445 (1983); Order No. 94-E, 25 FERC ¶ 61,458 (1983). Order Nos. 94-A through 94-D are currently pending on appeal *sub nom. Texas Eastern Transmission Corp. v. F.E.R.C., et al.*, No. 83-4390 (5th Cir.).

[7] *See, e.g., Transcontinental Gas Pipe Line Corp.*, 29 FERC ¶ 61,148 (1984).

Transco asserts that direct billing avoids the distortion in market signals that would result if it were to pass these amounts through its PGA and charge increased commodity rates to all of its customers.

Turning to the mechanics of its direct billing proposal, Transco proposes to calculate each customer's share of the retroactive allowances based on each customer's actual purchases during each month to which the retroactive allowances apply. Each customer's total amount due, plus interest, will then be billed and paid in equal installments over a twelve-month period, or paid in a single lump-sum payment at the customer's option. A portion of the total billings is still an estimate due to the fact that Transco is still verifying and paying a substantial portion of the allowances. The total, now estimated to be about $127.7 million, will be charged to a special subaccount at the time the direct billing begins. To the extent Transco pays an amount different than what it previously estimated, it will debit or credit the special subaccount, thereby modifying the remaining monthly billing amounts. At the end of the twelve-month period, Transco will transfer any remaining balances to its Account No. 191 and will reflect this amount in its next PGA.

Apart from the fact that Transco's $127.7 million figure presently includes projections, there are two other components of this figure that should be noted. First, this figure includes about $18.9 million in retroactive allowances Transco previously used to offset Btu refunds pursuant to Order No. 399-A.[8] The offset provision was subsequently vacated in *Interstate Natural Gas Association of America v. F.E.R.C., et al.*[9]

The second component consists of about $32.3 million of retroactive payments Transco already has recovered from its customers through its PGA as authorized in Docket

---

[8] *FERC Statutes and Regulations* ¶ 30,612 (1984).

[9] 756 F.2d 166 (D.C. Cir. 1985).

Nos. TA84-2-29-002 [10] and TA85-1-29-000.[11] In order to treat its customers as if it had not previously passed through any of these retroactive allowances, Transco proposes to refund this $32.3 million amount plus interest to its customers and then, after reallocating these payments in accordance with the matching principle of its proposal, directly billing these amounts as if they had not previously been recovered. Transco proposes to refund this amount within 15 days of the date of Commission approval of its petition.

Discussion

Based on our review of Transco's proposal we believe that it should be approved as conditioned below. It is administratively effective, equitable, and meets our concern that pricing signals not be distorted by the influx of substantial retroactive Order No. 94-A costs. Above all, it will break the logjam that has existed and permit a relatively speedy passthrough of long overdue cost responsibility.

We are mindful of the adverse reaction of the protesters and certain other intervenors who seek rejection or at least a hearing on the proposal. To the extent appropriate, we will condition our authorization to meet the various legitimate concerns of these parties.[12] However, the balance of the objections are without merit and do not persuade us that the proposal should not be implemented immediately.

---

[10] *Transcontinental Gas Pipe Line Corp.*, 27 FERC ¶ 61,227 (1984).

[11] *Transcontinental Gas Pipe Line Corp.*, 29 FERC ¶ 61,148 (1984).

[12] Our conditions relate to clarifying the procedures used, particularly interest calculations, ensuring clear and timely reporting, and requiring back-up data if not previously filed.

Several protesters argue that Transco's proposal is premature because the amounts to be billed are still uncertain and subject to change for various reasons. For example, several assert that Transco's proposal is premature because of the pending appeal of Order Nos. 94 through 94-D in the Fifth Circuit Court of Appeals.[13] WGL asserts that a decision by the court could render Transco's proposed charges uncollectible. Public Advocate urges that we require Transco to hold in escrow all amounts collected from its customers by direct billing pending the outcome of the Court of Appeals litigation.

Despite the fact that these orders have been challenged in court, section 271.1104 of our regulations promulgated by those orders is effective and authorizes Transco's first seller suppliers to charge and collect the subject production-related cost allowances from Transco.[14] We only address the procedures that Transco proposes to use to collect from its own customers. As we stated above, we believe those procedures are equitable.

Certain parties argue that the proposal also is premature because the accuracy of the allowances that Transco will directly bill is still at issue. South Jersey and Public Advocate note that Associated Gas Distributors (AGD) filed a blanket protest in Docket No. GP85-4-000 to the production-related cost "blanket affidavits" [15] filed

---

[13] *Texas Eastern Transmission Corp. v. F.E.R.C.*, No. 83-4390. Oral argument was held March 8, 1985.

[14] Because of section 271.1104(e)(3) requirements regarding the time to collect the retroactive allowances, i.e., by December 31, 1984, there may be cases where a waiver of that provision may be needed. We note that on September 7, 1984, Transco filed a petition for waiver of section 271.1104(e)(3) in Docket No. GP84-53-000. We shall deal with that petition by separate order.

[15] *See* 18 C.F.R. § 154.94(k) (1984). These blanket affidavits are only required with respect to first sales of gas still subject to the Natural Gas Act. Accordingly, AGD's protest does not relate to many of the production-related cost allowances at issue here.

by every company selling gas to Transco. In that protest, which is pending before the Commission, AGD requested a hearing regarding all of the production-related cost allowances covered by the protested blanket affidavits. South Jersey asserts that, among other things, the AGD protest raises the question of whether Transco's suppliers had contractual authority to collect these allowances. Brooklyn Union asserts that there is a material discrepancy between Transco's $127.7 million estimates of retroactive costs and the amounts it has previously identified in its previous PGA filings. Accordingly, Brooklyn Union requests that we not approve the direct billing proposal at this time and instead set for hearing the issue of whether Transco's payments of the retroactive allowances were properly computed and contractually authorized. Further, it urges that any direct billing procedure that we eventually adopt should be applicable only to the recovery of Transco's actual cash payments and not estimates.

We recognize the concerns of these parties, but we again emphasize that we are only approving a billing procedure. Our action here does not constitute a decision regarding the validity of any production-related cost allowances paid or collected as part of this procedure, and any amounts so paid and collected are subject to refund.[16] Further, we will adopt Brooklyn Union's suggestion that Transco only be permitted to directly bill for its actual cash payments to allay Brooklyn Union's concerns that billed amounts may recover estimated but as yet unpaid liabilities. Because Transco only pays what it believes is lawful under § 271.1104, this will mean that only those actual cash payments, on which both the first seller and

---

[16] All of Transco's first seller suppliers have a continuing obligation to refund any amounts unlawfully collected in excess of the applicable allowances authorized by section 271.1104. *See* 18 C.F.R. § 270.101(e) (1984). Further, no amounts that Transco pays in excess of the applicable NGPA maximum lawful price inclusive of such allowances are permitted automatic passthrough under section 601(b)(1) of the NGPA, 15 U.S.C. § 3431(b)(1).

Transco agree, will be collected through direct billing. That is consistent with the self-implementing feature of our production-related cost rules.[17] Any amounts in dispute between Transco and its suppliers are automatically excluded from the direct billing procedure. Disputes as to the amounts that are directly billed can be raised before the Production-Related Costs Board.[18]

Several protesters expressed concern that they may not be permitted to passthrough the directly billed amounts at the state level. For example, WGL asserts that Transco's customers may experience a lag of up to two years before recovering these billed costs through their local rates, or, alternatively, the state regulatory agencies may disallow the costs as premature. South Jersey seeks a delay in implementing direct billing until November 1, 1985, to coincide with its state-approved PGA-type procedures. Public Advocate argues that the proposal is grounded on what may be an incorrect assumption that distributors will attempt to match these amounts with their own customer's actual purchases just as Transco has done. If that is not the case, then, it argues, these billed amounts can be avoided by interruptible customers thereby shifting an unfair share of these costs to firm customers. All of these concerns relate to potential problems at the state and local level after billings are paid by Transco's customers and are more appropriately to be considered and resolved by the state or local regulatory agency.

Public Advocate further argues that since the production-related cost allowances to be directly billed are

---

[17] We note that our rules contemplate a self-implementing procedure whereby the purchaser is primarily responsible for policing the accuracy of production-related cost allowances it is billed by its first seller suppliers. *See* Order No. 94-C, *FERC Statutes and Regulations* ¶ 30,454, at pp. 30,472-73 (1983). Transco's ongoing process of verifying the amounts it is invoiced is in accord with these self-implementing procedures.

[18] See 18 C.F.R. § 271.1105 (1984).

purchased gas costs, they should be included in Transco's commodity costs and therefore subject to renegotiation to make Transco's gas more marketable. By directly billing these costs, Public Advocate asserts that the producers and Transco will continue to collect what Public Advocate believes is an excessive current cost of gas plus the retroactive allowances in the form of a demand-type charge. It argues that this would eliminate the incentive for the producers to give up on the collection of these allowances. Public Advocate asserts that the producers should be given the clear signal that the market place will not withstand the collection of the retroactive payments through any means and that they should renegotiate their contracts accordingly. We have reviewed the proposal and determined that the direct billing approach applied to the costs at issue here is equitable. This approach imposes the cost responsibility on the customers who bought the gas with which the section 110 payments are associated.

Several protesters argue that the proposal involves retroactive ratemaking. While Philadelphia Gas Works (PGW) charges that all collections would be suspect, PSE&G focuses only on the $32.3 million that Transco previously collected through its PGA but now intends to refund and then directly bill. PSE&G argues that the $32.3 million should not be refunded and then directly billed. These objections are without merit and, in effect, constitute a collateral attack on Order No. 94-A, *et al.* Order No. 94-A expressly authorized the collection of retroactively effective allowances which, to the extent directly billed now, are a cost to those customers. Moreover, authorizing a refund and subsequent direct billing of the $32.3 million already charged is not retroactive ratemaking. All amounts Transco previously collected in its PGA proceedings were collected subject to refund. To the extent we approve a direct billing of that $32.3 million amount (which is a prospective action), a refund is appropriate and is authorized by our prior PGA suspension orders to avoid a double-collection.

Columbia argues that Transco's direct billing proposal is similar to one that we rejected in *Tennessee Gas Pipeline Co.*, 29 FERC ¶ 61,150 (1984). Columbia's argument is incorrect. Tennessee proposed a permanent change to its tariff to allow for direct billing of any extraordinary item over $1 million. The Commission found that Tennessee had not shown good cause to waive the Commission's PGA rules, particularly section 154.38 (d) (4) (iv) (*d*). The Commission expressed its concern over the uncertainty of what Tennessee meant by an "extroardinary item" and the fact that the $1 million minimum did not, in and of itself, appear to be an extraordinary amount in comparison to Tennessee's unrecovered purchased gas costs.[19] Here, Transco's proposal relates to a clearly defined, extraordinary out-of-period cost item appropriate for special treatment. However, to be consistent with our discussion in *Tennessee*, we will condition our approval to require that, should Transco be obligated to refund any retroactive payments to its customers following the close of the direct billing period, it must directly pay the refunds in lump sum payments.

Miscellaneous Matters

Regarding interest, Transco only states that interest will be calculated "in all cases in accordance with the Commission's PGA regulations." To allay concerns regarding the ambiguity of Transco's interest computations, we will direct that, first, as to any production-related cost allowance payments that Transco paid but has not previously recouped, interest shall be computed for purposes of direct billing in accordance with section 154.38(d) (4) (iv) (*c*) of the Commission's rules. Second, as to the refund of the $32.3 million in previously collected amounts, interest shall be calculated in accordance with section 154.67(c) (2), 18 C.F.R. § 154.67(c) (2) (1984). This second requirement is to clarify that the

[19] 29 FERC ¶ 61,150, at p. 61,329.

interest Transco will owe on the $32.3 million refund amount cannot be reduced by the application of principles of interperiod tax allocation that would have applied had we authorized interest to be calculated in accordance with our PGA regulations as Transco requested.[20]

Several of the protesters assert that Transco's proposal is deficient insofar as it fails to include proposed revised tariff sheets. Furthermore, and consistent with their view that tariff sheets are required, these parties assert that any such filing should be suspended for the full 5-month statutory period under section 4(e) of the Natural Gas Act.[21]

While we agree that the amounts to be directly billed do constitute part of Transco's "rates" to its customers, this proposal does not require submission of tariff sheets. Any such sheets would necessarily change each month and would consist of a listing, company-by-company, of the actual amounts billed. That is information which we will obtain by report. As to the technical requirements of the Natural Gas Act requiring the filing of changes in tariffs, the original gas costs to which these section 110 payments apply were reflected on tariff sheets. Here, we are permitting retroactive change in those costs as permitted by the NGA and our regulations.[22] All billings will be subject to refund and may be protested at the close of the twelve-month billing period after each customer's final total billing is known. To the extent waivers of our rules are required to effect this billing procedure in this manner, they are granted for good cause shown.

---

[20] *See* 18 C.F.R. § 154.38(d)(4)(iv)(*b*) (1984).

[21] 15 U.S.C. § 717c(e).

[22] We note that we likewise did not require revised tariff sheets in the case of a similar direct billing proposal by Natural Gas Pipeline Company that we approved by letter order issued January 29, 1985. *See, Natural Gas Pipeline Co.*, 30 FERC ¶ 61,138 (1985).

Finally, we shall require Transco to file a report within 30 days of the end of the 12-month billing period detailing its actual billings and the disposition of remaining balances. Further, we will require that Transco file a refund report regarding its dispersal of the $32.3 million in refunds within 15 days after it makes those dispersals. We shall also require Transco to submit, within 15 days of each monthly billing, the information required by section 271.1104(f) and contract provisions necessary to verify the accuracy of its retroactive allowance payments.

Transco's Compliance Filing in Docket No. TA85-3-29-000

As we noted at the outset of this order, Transco filed certain tariff sheets that would have reflected PGA treatment of some of the same retroactive production-related cost allowance payments we are allowing it to directly bill. On May 31, 1985, Transco filed proposed revised tariff sheets in order to comply with Ordering Paragraph (C) of our PGA suspension order issued in Docket No. TA85-3-29-000 on April 30, 1985.[23] In that order, we rejected Transco's filed tariff sheets that reflected the elimination of recovery of retroactive production-related cost allowances and ordered Transco to include sufficient production-related costs to balance the amounts passed through to its winter customers in its last PGA in Docket No. TA85-1-29-000.[24] At the time we issued that order, Transco had yet to file its direct billing proposal. Now that we have its proposal before us, Transco's revised tariff sheets are no longer appropriate, and as such, we shall reject them as moot. In addition, and for the same reason, we shall reject as moot a motion Transco filed May 30, 1985, in Docket No. TA-85-3-29-000 requesting clarification of Ordering Paragraph (C) of our April 30,

---

[23] *Transcontinental Gas Pipe Line Corp.*, 31 FERC ¶ 61,129 (1985).

[24] *Id.* at pp. 61,265-65.

1985 order and stay of the effectiveness of the revised tariff sheets filed on June 5, 1985. Except as provided below, we therefore will not discuss any of the objections made to Transco's compliance filing in the protests and answers filed in response.

In its June 12, 1985 protest in Docket No. TA85-3-29-000, *et al.*, Public Advocate asserts that, in its compliance filing of May 31, 1985, Transco failed to provide the information regarding Transco's Market Retention Program and Market Maintenance Program (MRP and MMP, respectively) as ordered in our April 30th suspension order.[25] Upon review of Transco's compliance filing we find that, for the reasons set forth in Public Advocate's protest, Transco's response is deficient and not in compliance with our order. Accordingly, we shall order Transco to fully comply with Ordering Paragraph (C) of our April 30, 1985 order regarding its MRP and MMP within 30 days of this order. Finally, in an answer to Transco's motion for clarification and stay, WGL argues that Transco failed to provide information regarding Order 94-A costs it expects to pay during the current PGA period as directed by that order. In light of our action today, we will no longer require Transco to file that information and will modify our April 30th order accordingly.

The Commission orders:

(A) Transco's petition for direct billing filed in Docket No. RP85-148-000 on May 22, 1985, is granted and its direct billing procedure is made effective as of the date of issuance of this order subject to the conditions set forth below.

(B) Waiver of the Commission's regulations is granted to the extent necessary to permit Transco to implement its direct billing proposal as conditioned in this order.

---

[25] *Id.* at p. 61,266.

(C) Transco is permitted to implement the direct billing procedures described more fully in the text above and in its petition, subject to the following conditions:

(1) While it may initially base its twelve month billings on the total of actual plus estimated payments, Transco shall include in its monthly billings to its customers only amounts it has actually paid prior to the issuance of each such monthly billing.

(2) Transco shall compute interest on the production-related cost allowance payments it has made and not previously recouped in accordance with 18 C.F.R. § 154.38 (d) (4) (iv) (*c*) (1984) and section 22.7 of the General Terms and Conditions of Transco's FERC Gas Tariff, Second Revised Volume No. 1.

(3) Within 15 days of the date of this order, Transco shall directly refund, by lump-sum payments, $32,303,982.00 to its customers consistent with the discussion in the text above, plus interest thereon computed in accordance with 18 C.F.R. § 154.67(c) (2) (1984), and, within 15 days of the dispersal of such refunds, Transco shall file a report with the Commission detailing the amounts refunded to each customer, and showing the basis for each such amount and the date paid.

(4) Within 30 days of the end of the twelve-month billing period, Transco shall file a report that details: (a) Transco's actual monthly billings identified on a company-by-company basis and (b) the amount and disposition of any remaining balance in its special subaccount.

(5) Within 15 days of each monthly billing, Transco shall file: (a) the information required under 18 C.F.R. § 271.1104(f), and (b) the relevant contractual provisions supporting the billed costs, to the extent that such information or contracts have not previously been filed with the Commission.

(6) Within 30 days of the date of this order, Transco shall file all information regarding its MRP and MMP required by Ordering Paragraph (C) of the Commission's order issued April 30, 1985 in Docket No. TA85-3-29-000, *et al.*, including: (a) a detailed explanation of each such response (b) supporting information and data, (c) any other information necessary to fully respond to the deficiencies raised in the protest by Public Advocate filed on June 12, 1985, in Docket No. TA85-3-29-000, *et al.*

(D) Transco's Substitute Thirty-Fifth Revised Sheet Nos. 12 and 15 and Substitute First Revised Sheet No. 15-A to its FERC Gas Tariff, Second Revised Volume No. 1, are rejected as moot.

(E) Transco's Motion for Clarification and Stay filed May 30, 1985, in Docket No. TA85-3-29-000, *et al.* is rejected as moot.

(F) Ordering Paragraph (C) of the Commission's order issued April 30, 1985, in Docket No. TA85-3-29-000, *et al.*, 31 FERC ¶ 61,129, is modified to eliminate the requirement of filing information and revised tariff sheets regarding Order No. 94-A costs.

(G) The late motions to intervene filed by Piedmont, Conoco, Long Island, Elizabethtown, and Pennsylvania PUC are granted subject to the rules and regulations of the Commission; provided, however, that the participation of the intervenors shall be limited to matters affecting asserted rights and interests set forth in their motions to intervene; and provided, further, that the admission of such intervenors shall not be construed as recognition that they might be aggrieved by any order entered in this proceeding.

APPENDIX A

Motions to Intervene: Docket No. RP85-148-000

The Public Advocate of New Jersey [1]
The Brooklyn Union Gas Company [2]
South Jersey Gas Company [2]
Washington Gas Light Company and Frederick Gas Company, Inc.[1]
Columbia Gas Transmission Corporation [1]
Public Service Electric and Gas Company [2]
Philadelphia Gas Works
South Carolina Pipeline Corporation
Consolidated Edison Company of New York, Inc.
Allied Corporation
Atlanta Gas Light Corporation
Arco Oil and Gas Corporation
National Fuel Gas Supply Corporation
Consolidated Gas Transmission Corporation
Southern Natural Gas Company
Texas Eastern Transmission Corporation
North Carolina Natural Gas Corporation and Public Service Company of North Carolina, Inc.[1]
Pennsylvania Gas and Water Company
UGI Corporation
Philadelphia Electric Company
Commonwealth Gas Pipeline Corporation
Delmarva Power and Light Company
North Penn Gas Company
Owens-Corning Fiberglas Corporation
The Public Service Commission of the State of New York

---

[1] Also filed a protest.

[2] Requested hearing.

APPENDIX B

Motions to Intervene: Docket No. TA85-3-29-002

Public Advocate of New Jersey [1]

Texas Eastern Transmission Corporation

Brooklyn Union Gas Company

Consolidated Edison Company of New York, Inc.

Public Service Electric and Gas Company [2]

National Fuel Gas Supply Corporation

---

[1] Also filed a protest.

[2] Request hearing.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP85-170-000

TEXAS EASTERN TRANSMISSION CORPORATION

ORDER GRANTING PETITION TO INSTITUTE DIRECT BILLING PROCEDURE FOR RETROACTIVE PRODUCTION-RELATED COST ALLOWANCES WITH CONDITIONS, AND GRANTING WAIVERS

(Issued September 30, 1985)

Before Commissioners: Raymond J. O'Connor, Chairman; A. G. Sousa and Charles G. Stalon.

By this order we grant, with certain conditions, a petition which Texas Eastern Transmission Corporation (Tetco) filed on July 3, 1985, proposing that it be permitted to bill its customers directly for approximately $74 million (plus interest) in retroactive production-related cost allowances it asserts it has paid or will soon pay its natural gas suppliers.[1] These allowances are authorized under section 110(a)(2) of the Natural Gas Policy Act of 1978 (NGPA)[2] and section 271.1104[3] of the Commission's NGPA rules. According to Tetco, they relate to natural gas that Tetco purchased during the period July 25, 1980 through April 30, 1985. Tetco proposes to allocate these costs to those of its customers who actually benefited from the production-related services

---

[1] Tetco will collect interest pursuant to the Commission's PGA Regulations, 18 C.F.R. § 154.38(d).

[2] 15 U.S.C. § 3320(a)(2)..

[3] 18 C.F.R. § 271.1104 (1984).

performed during that period and then to directly bill these amounts in twelve monthly installments. The customers would have the option to make a single lump-sum payment. Tetco's direct billing procedure would replace the purchased gas adjustment (PGA) method of flowing through retroactive production-related costs in its rates. This approach will remove market distorting gas costs attributable to past periods from Tetco's current and future PGA filings, and thus avoid distortion of market signals.

Background

Pursuant to section 110 of the Natural Gas Policy Act of 1978 ("NGPA"), the Commission has established "production-related cost" allowances payable to certain sellers of natural gas in addition to the otherwise applicable maximum lawful ceiling price for natural gas. Among the costs listed under section 110 for which an allowance may be permitted, are costs borne by the seller for gathering, transporting, compressing and conditioning the gas sold. In December of 1978, the Commission issued interim rules implementing section 110 of the NGPA of 1978 (Docket No. RM79-3, issued December 1, 1978). [*FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,026]. Under those rules, certain qualified sellers were granted allowances above the applicable ceiling price for certain costs incurred in gathering, transporting and compressing natural gas. In most cases, however, sellers had to apply to the Commission before such an allowance could be collected.

On July 25, 1980, the Commission issued Order No. 94 [*FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,178] whereby the Commission suspended applications for gathering and compression allowances under section 110, but retained the application procedure for costs incurred to transport gas. The Commission announced in Order No. 94 its intention to establish in future orders industry-wide generic allowances

for compression and gathering costs which would be effective as of the date of issuance of Order No. 94.[4]

Tetco has already paid, and will pay producers a substantial amount for Order No. 94 costs that were incurred during the Commission defined retroactive period, as well as retroactive amounts related to the period March 7, 1983, through April 30, 1985.

Interventions

The Commission issued notice of Tetco's petition on July 12, 1985, with motions to intervene or protests due July 22, 1985. The persons listed in the Appendix to this order filed motions or notices to intervene. Four of the motions to intervene were filed late.

In determining if good cause has been shown to permit a late intervention, the Commission may consider the following factors: whether (1) the movant had good cause for failing to file the motion within the time prescribed; (2) any disruption of the proceeding might result from permitting the intervention; (3) any prejudice to, or additional burdens upon, the existing parties that might result from permitting the intervention; (4) the motion

---

[4] On January 24, 1983, the Commission issued the interim rule establishing industry-wide delivery and compression allowances in Docket Nos. RM80-73-000 and RM80-74-000, *et al.* The Commission also issued Order Nos. 94-A and 94-B [*FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,419, 30,421], as final orders, which defined the eligibility criteria for collection of the allowances for production-related costs (Docket Nos. RM80-47-002 and RM80-47-003). These rules were effective as of March 7, 1983. The rules were affirmed in *Texas Eastern Transmission Corp. v. F.E.R.C.*, No. 83-4390 (5th Cir., Aug. 19, 1985). The allowances for "production-related" costs are set out in the Commission's Rules and Regulations, section 271.1104. The regulations promulgated under section 110 provide for the retroactive recovery of costs incurred in delivering and compressing natural gas for services provided prior to March 7, 1983, the effective date of Order No. 94-A, but after July 25, 1980, the effective date of Order No. 94. 18 C.F.R. 271.1104(e).

conforms to the requirements of paragraph (b) of Rule 214; and (5) the movant's interest is not adequately represented by other parties in the proceeding.

In their respective motions, each of the late movants has established an interest in this proceeding. At this stage of the proceeding, other parties will not be prejudiced by granting their requests for intervention. Accordingly, the Commission finds that good cause exists to permit the late interventions.

Four interveners protested Tetco's petition: Columbia Gas Transmission Corporation, Municipal Defense Group, Philadelphia Gas Works and the Algonquin Customer Group. Two interveners requested that the Commission set this matter for hearing: New Jersey Natural Gas Company and National Gas and Oil Company. The protesters and New Jersey Natural Gas company raise no issues which were not previously addressed by the Commission in orders approving direct billing proposals by Transcontinental Gas Pipe Line Corporation and Tennessee Gas Pipeline Company;[5] their arguments therefore will not be specifically addressed herein.

Protests

National Gas and Oil Company (NGO) asserts that Tetco's billing allocation is incorrect. NGO claims that its bill is partially based on volumes NGO had transferred to other of Tetco's DCQ customers and that Tetco's proposal would result in an overcharge to NGO of $606,756.39. The Commission will direct that Tetco file within 15 days of the issuance Commission's order either: (1) a response to the allegations of NGO, or (2) an appropriately revised billing allocation if the concerns raised by NGO are correct. This compliance filing will provide NGO with a forum to continue to take issue with Tetco's direct billing proposal, if necessary.

---

[5] *See* 32 FERC ¶ 61,230 mimeo, at 6-11; 31 FERC ¶ 61,308, at p. 61,695 (1985).

Associated Natural Gas Company (ANG) filed comments objecting to Tetco's proposal. ANG lost a major segment of its distribution system December 1, 1984 [6] and is concerned that Tetco's proposal will result in a substantial rate increase to customers other than those who actually incurred the subject costs. ANG's estimated total bill is $506,496.10; the Commission staff estimates that about $55,000 of this relates to ANG's lost load.[7] While the Commission recognizes ANG's problem, this is an issue which is appropriately addressed at the state level; since it concerns sales not for resale, it is not subject to Commission determination.

Discussion

Tetco's proposal is for an equitable and practical method of allocating cost responsibility, similar to proposals the Commission has approved in two previous instances.[8] The Commission agrees, however, with those protesters who argue that Tetco should not include estimated amounts in its billing. It is appropriate, nonetheless, to use estimates to calculate the total amount upon which the twelve monthly bills are based in order to avoid progressively larger bills as payments to producers are actually made. Limiting Tetco's collection of retroactive Order No. 94 amounts to the levels it has actually paid at the time of the monthly billing will also provide Tetco with an incentive to process outstanding production-related cost invoices so they can be included in monthly bills. We will, therefore, approve TETCO's proposal, subject to appropriate conditions, and grant the necessary

---

[6] The distribution system was operated by ANG until November 30, 1984, when the City of Kennett, Missouri acquired it. Kennett now buys gas directly from Tetco. The necessary abandonments and certificates were issued in Docket Nos. CP83-300 and CP83-301.

[7] Based on ANG's release to Kennett of 10.811 percent of ANG's purchases from Tetco pursuant to the noted dockets. ANG's operation of the Kennett distribution system is non-jurisdictional.

[8] *See* footnote 5, *supra*, and accompanying text.

waivers. This acceptance does not constitute a decision regarding the validity of any production-related cost allowances paid or collected as part of this procedure; any amounts so paid and collected are subject to refund.[9]

The Commission orders:

(A) Tetco's petition for direct billing filed in Docket No. RP85-17-000 on July 3, 1985, is granted, and its direct billing procedure is made effective as of October 1, 1985, subject to the conditions set forth below:

(1) Production-related cost allowances paid or collected as part of the direct billing procedure are subject to refund as provided in this order;

(2) While Tetco may initially base its twelve monthly billings to its customers on the total retroactive Order No. 94 payments (both estimated and actual), it may include in its monthly bills to customers only amounts it has actually paid prior to the issuance of each monthly billing;

(3) Tetco is directed to file within 15 days a response to NGO's allegations concerning its direct billing allocation, or a revised direct billing principal allocation consistent with NGO's concerns;

(4) Tetco is required to file a report, within 30 days of the end of the 12-month billing period, that details Tetco's actual monthly billings by customer, and the disposition of any remaining amounts; and

(5) Tetco is required to file, within 15 days of each monthly billing, (a) the information required under sec-

---

[9] All of Tetco's first seller suppliers have a continuing obligation to refund any amounts unlawfully collected in excess of the applicable allowances authorized by section 271.1104. *See* 18 C.F.R. § 270.101(e) (1984). Further, no amounts that Tetco pays in excess of the applicable NGPA maximum lawful price inclusive of such allowances are permitted automatic passthrough under section 601(b)(1) of the NGPA, 15 U.S.C. § 3431(b)(1).

tion 271.1104(f) of the Commission's regulations, and (b) the relevant contractual provisions supporting the billed costs, to the extent that such information has not been previously filed at the Commission;

(B) Waiver of the Commission's regulations is granted to the extent necessary to permit Tetco to implement its direct billing proposal as conditioned in this order.

(C) The late motions to intervene filed by National Gas and Oil Company, Long Island Lighting Company, Texas Gas Transmission Corporation, and Peoples Natural Gas Company, are granted subject to the rules and regulations of the Commission; provided, however, that the participation of the intervenors shall be limited to matters affecting asserted rights and interests set forth in their motions to intervene; and provided, further, that the admission of such intervenors shall not be construed as recognition that they might be aggrieved by any order entered in this proceeding.

(D) The petitions for hearing are denied.

APPENDIX

Motions to Intervene

1. Columbia Gas Transmission Corporation [1]
2. Municipal Defense Group [1]
3. Philadelphia Gas Works [1]
4. The Algonquin Customer Group [1]
5. New Jersey Natural Gas Company [2]
6. Associated Natural Gas Company
7. Consolidated Edison Co. of New York, Inc.
8. Equitable Gas Company
9. Arkla Energy Resources
10. Public Service Electric and Gas Company
11. Union Electric Company
12. Consolidated Gas Transmission Corporation
13. The Process Gas Consumers Group
14. Central Illinois Public Service Company
15. Niagara Mohawk Power Corporation
16. Algonquin Gas Transmission Company
17. Elizabethtown Gas Company
18. Philadelphia Electric Company
19. Brooklyn Union Gas Company
20. Transcontinental Gas Pipe Line Corporation
21. National Gas and Oil Company [2] [3]
22. Long Island Lighting Company [3]
23. Texas Gas Transmission Corporation [3]
24. The Peoples Natural Gas Company [3]

---

[1] Also filed protest.

[2] Requested hearing.

[3] Late-filed motion to intervene.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP85-181-000

TEXAS GAS TRANSMISSION CORPORATION

ORDER GRANTING PETITION TO INSTITUTE DIRECT BILLING PROCEDURE FOR RETROACTIVE PRODUCTION-RELATED COST ALLOWANCES WITH CONDITIONS, AND GRANTING WAIVER

(Issued October 16, 1985)

Before Commissioners: Raymond J. O'Connor, Chairman; A. G. Sousa and Charles G. Stalon.

By this order we grant, with certain conditions, a petition which Texas Gas Transmission Corporation (Texas Gas) filed on August 7, 1985, proposing that the Commission permit it to bill its customers directly for retroactive production-related cost allowances it asserts it has paid or will soon pay its natural gas suppliers. These allowances are authorized under section 110(a)(2) of the Natural Gas Policy Act of 1978 (NGPA)[1] and section 271.1104[2] of the Commission's NGPA rules. According to Texas Gas, they relate to natural gas that Texas Gas purchased during the period August 1, 1980, through December 31, 1984 (the "retroactive period").

---

[1] 15 U.S.C. § 3320(a)(2).

[2] 18 C.F.R. § 271.1104 (1984).

Texas Gas proposes to allocate these costs to those of its customers who actually benefitted from the production-related services performed, and then to bill these amounts directly to the customers. Texas Gas' direct billing procedure would replace the purchased gas adjustment (PGA) method of flowing through retroactive production-related costs in its rates. This approach will remove market distorting gas costs attributable to past periods from Texas Gas' current and future PGA filings, and thus avoid distortion of market signals.

Background

Pursuant to section 110 of the NGPA, the Commission has established "production-related cost" allowances payable to certain sellers of natural gas in addition to the otherwise applicable maximum lawful ceiling price for natural gas. Among the costs listed under section 110 for which an allowance may be permitted, are costs borne by the seller for gathering, transporting, compressing and conditioning the gas sold. In December of 1978, the Commission issued interim rules implementing section 110 of the NGPA (Docket No. RM79-3, issued November 29, 1978) [*FERC Statutes and Regulations* ¶ 30,026]. Under those rules, certain qualified sellers were granted allowances above the applicable ceiling price for certain costs incurred in gathering, transporting and compressing natural gas. In most cases, however, sellers had to apply to the Commission before such an allowance could be collected.

On July 25, 1980, the Commission issued Order No. 94 [*FERC Statutes and Regulations* ¶ 30,178] whereby the Commission suspended applications for gathering and compression allowances under section 110, but retained the application procedure for costs incurred to transport gas. The Commission announced in Order No. 94 its intention to establish in future orders industry-wide generic allowances for compression and gathering costs which

would be effective as of the date of issuance of Order No. 94.[3]

Texas Gas reviewed and verified a significant portion of the Order No. 94 costs incurred during the retroactive period and claimed by its producer-suppliers. Texas Gas offset these amounts (approximately $48.8 million) against a corresponding amount of Btu refunds owed to Texas Gas by the corresponding producers pursuant to Order No. 399-A [*FERC Statutes and Regulations* ¶ 30,612].[4] Since that time the offset mechanism has been vacated by the Commission in its Order No. 399-B [*FERC Statutes and Regulations* ¶ 30,651]. Additionally, Texas Gas states that it anticipates that its pipeline suppliers will soon bill it for retroactive Order No. 94 costs.[5]

---

[3] On January 24, 1983 [*FERC Statutes and Regulations* ¶ 30,420], the Commission issued the interim rule establishing industry-wide delivery and compression allowances in Docket Nos. RM80-73-000 and RM80-74-000, *et al.* The Commission also issued Order Nos. 94-A and 94-B [*FERC Statutes and Regulations* ¶ 30,419 and ¶ 30,421], as final orders, which defined the eligibility criteria for collection of the allowances for production-related costs (Docket Nos. RM80-47-000 and RM80-74-003). These rules were effective as of March 7, 1983. The rules were affirmed in *Texas Eastern Transmission Corp. v. F.E.R.C.*, No. 83-4390 (5th Cir., Aug. 19, 1985). The allowances for production-related costs are set out in the Commission's rules and regulations, section 271.1104, *supra*. The regulations promulgated under section 110 provide for the retroactive recovery of costs incurred in delivering and compressing natural gas for services provided prior to March 7, 1983, the effective date of Order No. 94-A, but after July 25, 1980, the effective date of Order No. 94. 18 C.F.R. § 271.1104(e).

[4] Order No. 399-A was subsequently overturned on appeal. *Interstate Natural Gas Association v. F.E.R.C.*, 756 F.2d 166 (D.C. Cir. 1985).

[5] The Commission has approved the petitions of two of Texas Gas' pipeline suppliers to collect retroactive Order No. 94 amounts by direct billing. *See Tennessee Gas Pipeline Co.*, 31 FERC ¶ 61,308 (1985); *Texas Eastern Transmission Corp.*, 32 FERC ¶ 61,493 (September 30, 1985).

The Proposed Direct Billing Mechanism

Texas Gas proposes, in order to implement its direct billing procedure, to calculate each customer's proportionate share of Order No. 94 costs during the retroactive period as compared to the total of all purchases by all customers on the system during the period. Texas Gas proposes next to compute the Btu refunds owed to each customer in accordance with the procedures specified in the Commission's Order No. 399.

Once Texas Gas has established the customer's Order No. 94 cost liability and its Btu refund, Texas Gas proposes to submit to the customers an invoice for the Order No. 94 costs and a credit memorandum reflecting the customer's Btu refund. The two statements are to be accompanied and reconciled by a payment from Texas Gas, if the customer's Btu refund exceeds its refund. In the latter case, to the extent that the customer's Order No. 94 costs exceed its Btu refund, the customer would have the option of paying this amount in one lump-sum payment, or in twelve monthly installments plus interest, computed in accordance with the Commission's PGA regulations. The twelve-month period would begin on the first day of the first month following Commission approval of this petition.

A new subaccount of Texas Gas' Account No. 191 would be created to include the Order No. 94 costs remaining which were not paid in a lump-sum payment. This new subaccount would be credited with the monthly payments received from the customers during the twelve-month period.

Motions to Intervene

Texas Gas' petition was noticed by the Commission on August 16, 1985, with comments due by August 23, 1985. Fourteen companies listed in the appendix filed timely motions to intervene. The Louisville Gas and Electric Co., Beckett Paper Company, and Indiana Gas Co. and

Ohio River Pipeline Corp. jointly, filed requests for leave to intervene out of time.

In determining if good cause has been shown to permit a late intervention, the Commission may consider the following factors: whether (1) the movant had good cause for failing to file the motion within the time prescribed; (2) any disruption of the proceeding might result from permitting the intervention; (3) any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; (4) the motion conforms to the requirements of paragraph (b) of Rule 214; and (5) the movant's interest is not adequately represented by other parties in the proceeding.

In their respective motions, the late movants have established an interest in this proceeding. At this early stage of the proceeding, other parties will not be prejudiced by granting the requests for intervention. Accordingly, the Commission finds that good cause exists to permit the late interventions.

Protests

Memphis Light, Gas and Water Division, City of Memphis, Tennessee (Memphis), protests in limited respects Texas Gas' petition. Specifically, Memphis' protest makes four recommendations: (a) that the Commission should expressly limit its approval to the billing procedure itself, and affirm that the amounts paid are subject to review and refund; (b) Texas Gas should only bill directly for its actual cash payments to first sellers; (c) Texas Gas should calculate interest for purposes of direct billing in accordance with Section 154.38(d)(4)(iv)(c) of the Commission's Regulations (interest provision of the PGA regulations); (d) Texas Gas should provide the Commission with schedules showing its calculations of Order No. 94 costs and individual customers' direct bill amounts. Memphis' recommendations have merit, and will be incorporated into the Commission's order.

Western Kentucky Gas Co. and Louisville Gas and Electric Co. expressed concern that Texas Gas' proposal might be considered as retroactive ratemaking. The Commission has found such concerns unwarranted in accepting an earlier proposal for direct billing.[6]

Columbia Gas Transmission Corp. (Columbia) states that its purchases from Texas Gas have declined since the retroactive period, and argues that as a consequence acceptance of Texas Gas' proposal will increase Columbia's gas costs by about $6.8 million. Columbia asserts that this frustrates the Commission's least-cost purchasing policy for pipelines, and obscures market signals. We find no merit in Columbia's protest. Contrary to Columbia's position, the direct billing mechanism avoids the distortion in market signals that would result if Texas Gas were to pass these Order No. 94 amounts through its PGA and charge increased commodity rates to all its customers. Further, these additional costs relate to prior period purchases of Columbia, and such costs should be borne by Columbia. If such costs were to remain in the PGA surcharge of Texas Gas different customers of Texas Gas would be required to bear such costs due to the changed customer purchase profile on Texas Gas' system.

The Public Service Commission of Commonwealth of Kentucky argues that production-related costs cannot be charged until the contractual entitlement of the producers thereto have finally been determined. Section 271.1104 of the Commission's regulations, however, authorizes Texas Gas' first seller suppliers to charge and collect the subject production-related cost allowances from Texas Gas. The Commission herein only addresses the procedures that Texas Gas proposes to use to collect from its own customers and not the costs themselves. Our acceptance of

---

[6] *See Transcontinental Gas Pipe Line Corp.*, Docket No. RP85-148-000, *et al.*, 32 FERC ¶ 61,230 (1985).

Texas Gas' proposal does not constitute a decision regarding the validity of any production-related cost allowances paid or collected as part of this procedure; accordingly any amounts so paid and collected are subject to refund.[7]

Beckett Paper Company argues that the direct billing proposal unfairly singles out one class of customers. The Commission finds no merit in this argument. Texas Gas proposes to direct bill all of its jurisdictional customers, not a particular class, for their share of the retroactive Order No. 94 costs based on each customer's actual purchases of gas during the retroactive period as compared to all system purchases during that time.

Discussion

Texas Gas' proposal is for an equitable and practical method of allocating cost responsibility, similar to proposals which the Commission had approved in two previous instances, involving Transcontinental Gas Pipe Line Corporation and Tennessee Gas Pipeline Company.[8] Texas Gas' proposal, however, to offset against its direct bills for retroactive production-related costs its Btu refunds is inappropriate. As we noted above, the Commission has vacated its Btu refund offset program in Order No. 399-B.

We will accordingly deny Texas Gas' proposal to the extent that it would offset its Order No. 94 costs with Btu refunds. With this exception, we will approve Texas

---

[7] All of Texas Gas' first seller suppliers have a continuing obligation to refund any amounts unlawfully collected in excess of the applicable allowances authorized by section 271.1104. *See* 18 C.F.R. § 270.101(e) (1984). Further, no amounts that Texas Gas pays in excess of the applicable NGPA maximum lawful price inclusive of such allowances are permitted automatic passthrough under section 601(b)(1) of the NGPA, 15 U.S.C. § 3431(b)(1).

[8] 32 FERC ¶ 61,230 (1985), and 31 FERC ¶ 61,380 (1985), respectively.

Gas' proposal, subject to appropriate conditions, and grant the necessary waivers. This acceptance does not constitute a decision regarding the validity of any production-related cost allowances paid or collected as part of this procedure; any amounts so paid and collected are subject to refund. Further, any amounts in dispute between Texas Gas and its suppliers are automatically excluded from the direct billing procedure.

The Commission orders:

(A) Texas Gas' petition for direct billing filed in Docket No. RP85-181-000 on August 1, 1985, is granted as modified herein, and its direct billing procedure is made effective as of November 1, 1985, subject to the conditions set forth below:

(1) While it may initially base its twelve month billings on the total of actual plus estimated payments, Texas Gas shall include in its monthly billing to its customers only amounts it has actually paid prior to the issuance of each such monthly billing;

(2) Texas Gas shall compute interest on the production-related cost allowance payments it has made and not previously recouped in accordance with 18 C.F.R. § 154.38(d)(4)(iv)(*c*)(1984);

(3) Production-related cost allowances paid or collected as part of the direct billing procedure are subject to refund as provided in this order;

(4) Amounts in dispute between Texas Gas and its suppliers are excluded from the direct billing procedure;

(5) Texas Gas is required to file a report, within 30 days of the end of the 12-month billing period, that details Texas Gas' actual monthly billings by customer, and the disposition of any remaining amounts; and

(6) Texas Gas is required to file, within 15 days of each monthly billing, (a) the information required under section 271.1104(f) of the Commission's regulations, and (b) the relevant contractual provisions supporting the billed costs, to the extent that such information has not been previously filed at the Commission.

(B) Waiver of the Commission's regulations is granted to the extent necessary to permit Texas Gas to implement its direct billing proposal as conditioned in this order.

(C) The late motions to intervene filed by Louisville Gas and Electric Company, Beckett Paper Company, and Indiana Gas Company and Ohio River Pipeline Corporation jointly, are granted subject to the rules and regulations of the Commission; provided, however, that the participation of the intervenors shall be limited to matters affecting asserted rights and interests set forth in their motions to intervene; and provided, further, that the admission of such intervenors shall not be construed as recognition that they might be aggrieved by any order entered in this proceeding.

(D) The petition for hearing is denied.

APPENDIX

Motions to Intervene

Columbia Gas Transmission Corporation [1]

Memphis Light, Gas and Water Division, City of Memphis, Tennessee [2]

The Cincinnati Gas and Electric Company and Lawrenceberg Gas Transmission Corporation

The City of Hamilton, Ohio

The Peoples Natural Gas Company

Arkla Energy Resources

Niagara Mohawk Power Corporation

ANR Pipeline Company

Texas Eastern Transmission Corporation

Western Kentucky Gas Company [2] [4]

The Public Service Commission of The Commonwealth of Kentucky [1]

Consolidated Gas Transmission Corporation

Associated Natural Gas Company

Mobil Oil Exploration and Producing Southeast Inc.

Louisville Gas and Electric Company [3]

Beckett Paper Company [3]

Indiana Gas Company and Ohio River Pipeline Corporation [3]

---

[1] Also filed a protest.

[2] Limited protest.

[3] Filed out of time.

[4] Request hearing.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP85-202-000

TRUNKLINE GAS COMPANY

ORDER GRANTING PETITION TO INSTITUTE DIRECT BILLING PROCEDURE FOR RETROACTIVE PRODUCTION-RELATED COST ALLOWANCES WITH CONDITIONS, AND GRANTING WAIVER

(Issued November 14, 1985)

Before Commissioners: Raymond J. O'Connor, Chairman; A. G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

By this order we grant, with certain conditions, a petition which Trunkline Gas Company (Trunkline) filed on September 23, 1985, proposing that the Commission permit it to bill its customers directly for retroactive production-related cost allowances it asserts it has paid or will soon pay its natural gas suppliers. These allowances are authorized under section 110(a) of the Natural Gas Policy Act of 1978 (NGPA)[1] and section 271.1104[2] of the Commission's NGPA rules. According to Trunkline, they relate to natural gas that Trunkline purchased during the period August 1, through February 28, 1985, (the "retroactive period").

---

[1] 15 U.S.C. § 3320(a)(2).

[2] 18 C.F.R. § 271.1104 (1984).

Trunkline proposes to allocate these costs to those of its customers who actually benefitted from the production-related services performed, and then bill these amounts directly to the customers. Trunkline's direct billing procedure would replace the purchased gas adjustment (PGA) method of flowing through retroactive production-related costs in its rates. This approach will remove market distorting costs attributable to past periods from Trunkline's current and future PGA filings, and thus avoid distortion of market signals.

Background

Pursuant to section 110 of the NGPA, the Commission has established "production-related cost" allowances payable to certain sellers of natural gas in addition to the otherwise applicable maximum lawful ceiling price for natural gas. Among the costs listed under section 110 for which an allowance may be permitted, are costs borne by the seller for gathering, transporting, compressing and conditioning the gas sold. In December of 1978, the Commission issued interim rules implementing section 110 of the NGPA (Docket No. RM79-3, issued December 1, 1978) [*FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,026]. Under those rules, certain qualified sellers were granted allowances above the applicable ceiling price for certain costs incurred in gathering, transporting and compressing natural gas. In most cases, however, sellers had to apply to the Commission before such an allowance could be collected.

On July 25, 1980, the Commission issued Order No. 94 [*FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,178] whereby the Commission suspended applications for gathering and compression allowances under section 110, but retained the application procedure for costs incurred to transport gas. The Commission announced in Order No. 94 its intention to establish in future orders industry-wide generic allowances for

compression and gathering costs which would be effective as of the date of issuance of Order No. 94.[3]

Trunkline states that it has made or will make by September 30, 1985, payments on a retroactive basis for production-related costs incurred during the period from July 25, 1980 through February 28, 1985 (the retroactive period). Trunkline estimates that the retroactive amount owed to its suppliers is approximately $107.5 million. This figure includes amounts previously offset against producer Btu refunds under the offset mechanism established in the Commission's Order No. 399-A.[4] On appeal, the Commission's proposed offset mechanism was reversed.[5]

Trunkline has agreed to provide the necessary supporting detail for the amounts paid, including the information required by section 271.1104(f) of the Commission's regulations [6] and the relevant contract provisions, to the extent such information has not already been provided.

---

[3] On January 24, 1983 [*FERC Statutes and Regulations* ¶ 30,420], the Commission issued the interim rule establishing industry-wide delivery and compression allowances in Docket Nos. RM80-73-000 and RM80-74-000, *et al.* The Commission also issued Order Nos. 94-A and 94-B [*FERC Statutes and Regulations* ¶ 30,419], as final orders, which defined the eligibility criteria for collection of the allowances for production-related costs (Docket Nos. RM80-47-000 and RM80-74-003). These rules were effective as of March 7, 1983. The rules were affirmed in *Texas Eastern Transmission Corp. v. F.E.R.C.*, No. 83-4390 (5th Cir., Aug. 19, 1985). The allowances for production-related costs are set out in the Commission's rules and regulations, section 271.1104 *supra*. The regulations promulgated under section 110 provide for the retroactive recovery of costs incurred in delivering and compressing natural gas for services provided prior to March 7, 1983, the effective date of Order No. 94-A, but after July 25, 1980, the effective date of Order No. 94. 18 C.F.R. § 271.1104(e).

[4] 29 FERC ¶ 61,254 (1984) [*FERC Statutes and Regulations* ¶ 30,612].

[5] *Interstate Natural Gas Association of America v. F.E.R.C.*, 756 F.2d 166 (D.C. Cir. 1985).

[6] 18 C.F.R. § 271.1104(f) (1984).

The Proposed Direct Billing Mechanism

Trunkline proposes, in order to implement its direct billing procedure, to calculate each customer's proportionate share of Order No. 94 costs during the retroactive period as compared to the total of all purchases by all customers on the system during the period.

Trunkline proposes to give its customers the option of making payment through a lump-sum amount or in monthly installments with interest over a twelve-month period commencing November 1, 1985 through October 31, 1986.

Trunkline also proposes to establish a separate subaccount of its Account No. 191 to be debited with payments made to producers and credited to reflect recovery of such amounts from Trunkline's customers. Trunkline proposes to debit or credit the special subaccount with the difference between any amount it pays and the estimated amounts included in this filing. Further, Trunkline proposes that any balance remaining in the subaccount at the end of the twelve-month installment billing period will be transferred to the appropriate current subaccount of Account No. 191 for inclusion in its subsequent PGA filing.

Trunkline's proposal to create a special subaccount has aroused concern among several of Trunkline's customers. This issue will be discussed, *infra*, in greater detail.

Interventions

Public notice of Trunkline's petition was issued on September 26, 1985, with comments due by October 4, 1985. The persons listed in Appendix A to this order filed timely motions or notices to intervene. Pursuant to Rule 214 [7] any timely filed motions to intervene are granted unless an answer in opposition is filed within 15 days of

---

[7] 18 C.F.R. § 385.214 (1984).

the date such motion is filed. Any timely filed motions or notices not listed in the appendices are also granted in accordance with the conditions of Rule 214. Illinois Power Company (Illinois Power) filed a motion to intervene out of time.

In determining if good cause has been shown to permit a late intervention, the Commission may consider the following factors: whether (1) the movant had good cause for failing to file the motion within the time prescribed; (2) any disruption of the proceeding might result from permitting the intervention; (3) any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; (4) the motion conforms to the requirements of paragraph (b) of Rule 214; and (5) the movant's interest is not adequately represented by other parties in the proceeding.

In its motion, the late movant has established an interest in this proceeding. At this early stage of the proceeding, other parties will not be prejudiced by granting the request for intervention. Accordingly, the Commission finds that good cause exists to permit the late intervention.

Protests

Five persons filed protests in Docket No. RP85-202-000: Columbia Gas Transmission Corporation (Columbia), Consumers Power Company (Consumers Power), General Service Customer Group (GSC), Indiana Gas Company, Inc. (Indiana Gas), and Michigan Gas Utilities Company (MGU).

Columbia purchases gas from Panhandle Eastern Pipe Line Company (Panhandle) who, in turn, purchases gas from Trunkline. Columbia states that Trunkline's proposal in Docket No. RP85-202-000 may affect natural gas service to Columbia and the rates under which such service is rendered.

Columbia argues that Trunkline's proposal is similar to one we rejected in *Tennessee Gas Pipeline Co.*, 29 FERC ¶ 61,150 (1984). Columbia's argument is incorrect. Tennessee proposed a permanent change to its tariff to allow for direct billing of any extraordinary item over $1 million. The Commission found that Tennessee had not shown good cause to waive the Commission's PGA rules, particularly section 154.38(d)(4)(iv)(*d*). The Commission expressed its concern over the uncertainty of what Tennessee meant by an "extraordinary item" and the fact that the $1 million minimum did not, in and of itself, appear to be an extraordinary amount in comparison to Tennessee's unrecovered purchased gas costs. Here, Trunkline's proposal relates to a clearly defined, extraordinary out-of-period cost item appropriate for special treatment. However, to be consistent with our discussion in Tennessee, we will condition our approval to require that, should Trunkline be obligated to refund any retroactive payments to its customers following the close of the direct billing period, it must directly pay the refunds in lump sum payments. Columbia argues further that Trunkline's proposal is a departure from the Commission's rate treatment of deferred gas costs. To the contrary, as an equitable and practical method of allocating cost responsibility, the Commission has approved similar direct billing proposals in several instances.[8]

Columbia states that its purchases from Panhandle have declined since the retroactive period, and argues that as a consequence, Trunkline's proposal will increase Columbia's gas costs. Columbia asserts that this frustrates the Commission's least-cost purchasing policy for pipelines, and obscures market signals. We find no merit in Columbia's protest. Contrary to Columbia's position, the direct billing mechanism avoids the distortion in market signals

---

[8] *See, e.g., Trancontinental Gas Pipe Line Corp.*, 32 FERC ¶ 61,230 (1985); and *Consolidated Gas Transmission Corporation*, 32 FERC ¶ 61,448.

that would result if Trunkline were to pass these Order No. 94 amounts through its PGA and charge increased commodity rates to all its customers. Further, these additional costs relate to prior period purchases of Columbia, and such costs should be borne by Columbia. If such costs were to remain in the PGA surcharge of Trunkline, different customers of Trunkline would be required to bear such costs due to the changed customer purchase profile on Trunkline's system.

Consumers Power and GSC express concern regarding Trunkline's proposal to establish a special subaccount of Account No. 191, as discussed above.[9] Consumers Power argues that under such an arrangement, the risk of non-payment of the amounts billed by Trunkline would fall on Trunkline's present customers in proportion to their current purchases. Consumers Power argues further that the onus of enforcing payment against a non-paying customer should rest with Trunkline, not its paying customers.

GSC urges the Commission to condition acceptance of Trunkline's proposal so that any amounts charged, but not collected, from a particular customer may not ultimately rest upon other customers through the transfer of the special subaccount's balance at the end of 12 months to Trunkline's next effective PGA filing.

The Commission agrees that Trunkline should not be allowed to shift the risk of non-payment of Order 94 costs. To allay the concerns voiced by the protestants, we will condition our acceptance of Trunkline's proposal as follows. Trunkline is permitted to establish, for accounting purposes, a special subaccount of Account No. 191 to debit amounts of retroactive payments to producers, and to credit payments by customers. However, Trunkline will not be permitted to transfer any amounts from this

---

[9] In a separate motion to intervene, MGU requests that Trunkline's petition be conditioned as set forth in GSC's motion to intervene.

special subaccount at the end of the 12 months to the next PGA period which relate to any non-payment of direct bills Trunkline has assessed any customer.

Additionally, GSC argues that a refund condition should be imposed for any costs charged to the proposed special Account 191 subaccount that may subsequently be reduced or eliminated for any reason. Our order states that production-related costs paid or collected as part of the direct billing procedure are subject to refund. The order does not permit amounts in dispute between Trunkline and its suppliers to be included in the direct billing procedure. We believe such conditions address the concern raised by GSC.

GSC requests that our order be conditioned upon the application of the settlement agreement approved in *Trunkline Gas Co.*, Docket No. RP83-93-000 (Phase I).[10] GSC believes the settlement restrains Trunkline's recovery of retroactive production-related costs by not permitting any production-related cost recovery, in excess of $2.57 per Mcf in gas costs, for amounts that were not authorized order contracts in effect on December 31, 1984.

Our action in Docket No. RP85-202-000 is consistent with the terms of the settlement and in no way conflicts with the Commission's decision in Docket No. RP83-93-000.

GSC has also requested that the supporting detail to be supplied by Trunkline, as well as the company's final report showing actual monthly billings to customers, be served upon GSC and all other parties to this proceeding. We agree that the final report submitted by Trunkline to the Commission should be served on all parties in this proceeding and we require Trunkline to do so. As to GSC's request for service of the supporting documenta-

---

[10] The Commission approved the settlement agreement in an order issued October 25, 1985. 33 FERC ¶ 61,069 (1985).

tion, including the information required by section 271.1104(f) of the Commission's regulations,[11] we will not require Trunkline to supply such information to all parties. The Commission's regulations require Trunkline to file all supporting documentation with the Commission so that it may be available, at the Commission, to the public. Such supporting documentation is often voluminous and, for that reason, the Commission's practice has been to retain these materials at the Commission and permit the public to view them here.

Consumers Power expresses an additional concern regarding the inclusion of estimated amounts in Trunkline's proposal. We believe that this issue is fully addressed below in the ordering paragraphs wherein it is stated that Trunkline shall include only amounts it has actually paid prior to the issuance of each monthly billing.

Indiana Gas requests that the Commission specify in its order that Mississippi River Transmission Corporation (MRT) is responsible for paying the production-related costs shown in Appendix A to Trunkline's petition. During the retroactive period in issue here, MRT was a jurisdictional sales customer of Trunkline. Effective May 1, 1985, MRT cancelled its gas purchase contract with Trunkline, and is, at present, no longer a jurisdictional customer of Trunkline. Indiana Gas, as well as other protesters urges the Commission, in its order, to direct MRT to pay its allocable share of retroactive Order 94 payments.

We are mindful of the concerns expressed by Indiana Gas and other protesters. However, Indiana Gas' argument is premature. In its petition, Trunkline has listed, at Appendix A, those customers who will be billed for retroactive Order 94 costs and the amount allocable to each customer. MRT is listed among those customers included in Trunkline's direct billing procedure. Thus, we

---

[11] 18 C.F.R. § 271.1104(f).

are not confronted with a situation where MRT has refused payment for costs billed by Trunkline. The interests of Indiana Gas and other customers are protected by our decision to not permit Trunkline to flow through its PGA any unpaid amounts that remain owing at the end of the 12-month period.

Discussion

Trunkline's proposal is for an equitable and practical method of allocating cost responsibility, similar to proposals which the Commission has approved in previous instances. *See, e.g., Transcontinental Gas Pipe Line Corp.*, 32 FERC ¶ 61,230 (1985) and *Tennessee Gas Pipeline Co.*, 31 FERC ¶ 61,380 (1985). We remain cognizant of the concerns expressed by the protesters and other intervenors. We have conditioned our acceptance of Trunkline's petition, as appropriate, to meet the legitimate concerns of these parties.

With the conditions outlined below and discussed in the order, we will approve Trunkline's proposal, and grant the necessary waivers. This acceptance does not constitute a decision regarding the validity of any production-related cost allowances paid or collected as part of this procedure; any amounts so paid and collected are subject to refund.[12] Further, any amounts in dispute between Trunkline and its suppliers are automatically excluded from the direct billing procedure.

The Commission orders:

(A) Trunkline's petition for direct billing filed in Docket No. RP85-202-000 on September 23, 1985, is

---

[12] All of Trunkline's first seller suppliers have a continuing obligation to refund any amounts unlawfully collected in excess of the applicable allowances authorized by section 271.1104. *See* 18 C.F.R. § 270.101(e) (1984). Further, amounts that Trunkline pays in excess of the applicable NGPA maximum lawful price inclusive of such allowances are not permitted automatic passthrough under section 601(b)(1) of the NGPA, 15 U.S.C. § 3431(b)(1).

granted as modified herein, and its direct billing procedure is made effective as of November 1, 1985, subject to the conditions set forth below:

(1) While it may initially base its twelve month billings on the total of actual plus estimated payments, Trunkline shall include in its monthly billing to its customers only amounts it has actually paid prior to the issuance of each such monthly billing;

(2) Trunkline shall compute interest on the production-related cost allowance payments it has made and not previously recouped in accordance with 18 C.F.R. § 154.38(d)(4)(iv)(*c*) (1984);

(3) Production-related cost allowances paid or collected as part of the direct billing procedure are subject to refund as provided in this order;

(4) Amounts in dispute between Trunkline and its suppliers are excluded from the direct billing procedure;

(5) Trunkline is required to file a report, within 30 days of the end of the 12-month billing period, that details Trunkline's actual monthly billings by customer, and the disposition of any remaining amounts; and Trunkline shall be required to serve this report on all parties to this proceeding;

(6) Trunkline shall not be allowed, in the event of non-payment of these billed amounts by any customer to recover such amounts from its other customers; and

(7) Trunkline is required to file, within 15 days of each monthly billing, (a) the information required under section 271.1104(f) of the Commission's regulations, and (b) the relevant contractual provisions supporting the billing costs, to the extent that such information has not been previously filed at the Commission.

(B) Waiver of the Commission's regulations is granted to the extent necessary to permit Trunkline to implement its direct billing proposal as conditioned in this order.

(C) The late motion to intervene filed by Illinois Power Company is granted subject to the rules and regulations of the Commission; provided, however, that the participation of the intervenor shall be limited to matters affecting asserted rights and interests set forth in its motion to intervene; and provided, further, that the admission of such intervenor shall not be construed as recognition that it might be aggrieved by any order entered in this proceeding.

Commissioners Trabandt and Naeve voted present.

APPENDIX

Intervenors

Association of Businesses Advocating Tariff Equity

Columbia Gas Transmission Corporation [1]

Consumers Power Company [1]

General Service Customer Group [1]

Illinois Commerce Commission

Illinois Power Company [2]

Indiana Gas Company, Inc.[1]

Michigan Consolidated Gas Company

Michigan Gas Utilities Company [1]

Northern Indiana Public Service Company

---

[1] Includes protest or comments.

[2] Filed out of time.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP85-203-000

PANHANDLE EASTERN PIPE LINE COMPANY

ORDER GRANTING PETITION TO INSTITUTE DIRECT BILLING PROCEDURE FOR PRODUCTION-RELATED COST ALLOWANCES WITH CONDITIONS, GRANTING WAIVER, PROVIDING FOR HEARING, ESTABLISHING PROCEDURES, AND GRANTING INTERVENTIONS

(Issued November 14, 1985)

Before Commissioners: Raymond J. O'Connor, Chairman; A. G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

Panhandle Eastern Pipe Line Company (Panhandle), on September 23, 1985, filed a petition requesting authorization to use the direct billing procedure for retroactive production-related costs. Panhandle proposes to bill each jurisdictional customer directly for its share of certain payments by Panhandle to its producers and pipeline supplier, Trunkline Gas Company (Trunkline), for retroactive production-related costs incurred over the past period from July 25, 1980 through February 28, 1985. Each customer's portion of the payments would be based on the customer's corresponding portion of total jurisdictional sales during August 1, 1980 through February 28, 1985. The billing amounts, including interest, would be billed in twelve equal monthly installments commencing November 1985, or at the option of the customer,

could be paid through a single lump-sum payment at the initial billing.

In support of its request, Panhandle states that this special billing procedure will accomplish the recovery of the extraordinary costs in a more equitable and orderly fashion than including these amounts in the computations under its Purchased Gas Cost Adjustment (PGA) provision of its tariff. Panhandle states, that this procedure will result in a matching of the incurrence of these costs with the volumes purchased by the customers during the relevant period. Panhandle requests waiver of our regulations and its tariff to permit implementation of this direct billing procedure.

Background

The retroactive production-related costs are authorized under section 110(a) of the Natural Gas Policy Act of 1978 (NGPA)[1] and section 271.1104 of the Commission's NGPA rules.[2] Under section 110 of the NGPA, generic allowances were established, above the NGPA ceiling prices for natural gas, for production-related costs, which are defined to include cost (other than "production costs") incurred in delivery, compression, treatment and conditioning of natural gas by the producer. The specific generic allowances for production-related costs are set forth in section 271.1104 of our regulations under the NGPA, promulgated as an Interim Rule on January 24, 1983 in Docket Nos. RM80-73 and RM80-74, *FERC Statutes and Regulations* ¶ 30,420 (1983), and as a Final Rule by Order No. 334 issued September 27, 1983, *FERC Statutes and Regulations* ¶ 30,495 (1983). Those allowances were established pursuant to the general policies on recovery of production-related costs developed in Order Nos. 94 and 94-A issued July 25, 1980 and January 24, 1983 in Docket No. RM80-47, *FERC Stat-*

[1] 15 U.S.C. § 3320(a)(2).

[2] 18 C.F.R. § 271.1104 (1984).

utes and Regulations ¶ 30,178 (1980) and ¶ 30,419 (1983). On appeal, the Order No. 94 rule was affirmed.[3]

In the related Order No. 399-A, 29 FERC ¶ 61,254 (1984) [*FERC Statutes and Regulations* ¶ 30,612], producers were authorized to offset their refunds of Btu measurement overcollections against amounts due them for production-related costs. However, the court struck down that offset mechanism.[4] The Commission then provided for payment, by August 30, 1985, of Btu refund amounts from producers who used that offset mechanism[5] and for corresponding purchaser payments for production-related costs by September 30, 1985.[6]

Payments To Be Billed

Panhandle states that it has, or will make by September 30, 1985, substantial payments for production-related costs for the period July 25, 1980 through February 28, 1985. While it has not completed the verification of all of the amounts, Panhandle expects that its payments will total $25.2 million, which include amounts previously offset against producer Btu refunds.

Additionally, Panhandle expects to be billed by Trunkline for approximately $49 million, plus interest, as its portion of production-related cost payments made by Trunkline to its producer suppliers.[7] Panhandle states

---

[3] *Texas Eastern Transmission Corp. v. F.E.R.C.*, No. 83-4390 (5th Cir., Aug. 19, 1985) (*Texas Eastern*).

[4] *Interstate Natural Gas Ass'n. of America v. F.E.R.C.*, 756 F.2d 166 (D.C. Cir., 1985).

[5] Order No. 399-B, *FERC Statutes and Regulations* ¶ 30,651 (1985).

[6] Order No. 94-F, *FERC Statutes and Regulations* ¶ 30,654 (1985).

[7] On September 23, 1985, Trunkline filed in Docket No. RP85-202-000 a petition for direct billing with the Commission, which included a request to bill $49,027,365.54 to Panhandle as its portion of production-related costs.

that it proposes to include the amounts to be paid to Trunkline within its direct billing mechanism.

Panhandle agrees to provide the supporting detail for its payments, including the information required by section 271.1104(f) of our regulations and the relevant contract provisions, to the extent such information has not already been provided.

Direct Billing Procedure

Panhandle proposes to collect the amounts actually paid to producers together with interest in accordance with our regulations. Specifically, under the proposal, Panhandle will allocate the amounts among its jurisdictional customers according to the ratio of each customer's total jurisdictional sales during the August 1, 1980 through February 28, 1985 period to the total sales during that same period. The cost amount allocated to each customer, plus interest, will be recouped in twelve equal monthly installments to be separately invoiced commencing November 1, 1985, with each customer having the option to make a lump-sum payment.

To account for this mechanism, Panhandle proposes to establish a separate sub-account of Account No. 191. Panhandle will charge that sub-account its payments to producers and to Trunkline and will credit the amounts received under its direct billing procedure. To the extent Panhandle pays any amount which differs from the estimated amount included, it will debit or credit the difference to the special sub-account. The balance, if any, at the conclusion of the twelve-month installment period will be transferred to the appropriate current sub-account of Account No. 191 for inclusion in the next PGA adjustment. Panhandle proposes to submit a final report showing the actual monthly billings to each customer and the disposition of any final balance in the special sub-account.

Public Notice

Notice of Panhandle's petition was issued on September 26, 1985, with motions to intervene or protests due by

October 4, 1985. Motions and notices of intervention were filed by those listed in the appendix to this order. Pursuant to Rule 214,[8] any timely filed motions to intervene are granted unless an answer in opposition is filed within 15 days of the date such motion is filed. Any timely filed motions or notices not listed in the appendix are also granted in accordance with the conditions of Rule 214.

Late Interventions

Late motions to intervene were filed by the Municipal Defense Group (MDG) and Northern Indiana Public Service Company (Northern Indiana) on October 8, 1985, and by Illinois Power Company (Illinois Power) on October 15, 1985. In determining if good cause has been shown to permit a late intervention, the Commission may consider the following factors: whether (1) the movant has good cause for failing to file the motion within the time prescribed; (2) any disruption of the proceeding might result from permitting the intervention; (3) any prejudice to, or additional burdens upon, the existing parties might result from permitting the intervention; (4) the motion conforms to the requirements of paragraph (b) of Rule 214; and (5) the movant's interest is not adequately represented by other parties in the proceeding.

In their motions, MDG, Northern Indiana, and Illinois Power have established an interest in this proceeding and have shown good cause for not filing their motions within the time period prescribed. As this early stage of the proceeding, other parties will not be prejudiced by granting the requests for intervention. Accordingly, the Commission finds that good cause exists to permit these late interventions.

Protests

1. MDG requests the Commission to reject Panhandle's petition or, if not rejected, to hold a hearing "re-

[8] 18 C.F.R. § 385.214 (1985).

lating to the issues".[9] A hearing will be ordered herein based on the protest of General Service Customer Group (GSC), which will be discussed below. However, we disagree with MDG's argument that Panhandle's proposal violates the filed rate doctrine and the rule against retroactive ratemaking. That issue was determined against MDG's position by the *Texas Eastern* court when it responded to a similar argument made in that case:

> In their third challenge, the Producers . . . quarrel with the Commission's failure to make all production-related allowances recoverable retroactive to 1978, the year of the NGPA's passage. The Pipelines and the Associated Gas Distributors, on the other hand, maintain that the allowances should be collectable only from 1983, the time provided for when the allowance was finally established in Order No. 94-B . . . [T]he Commission respond[ed] that it had promised in Order No. 94 that allowances eventually created with respect to interstate gas would be retrotive to [July 25, 1980—the date of issuance of the Interim Rule of Order No. 94]. . .

Slip op., pp. 21-22. The court found that the Commission decision to permit the production-related costs to be collected from the 1980 date was proper because it ". . . was a fair balancing of the various problems involved . . ." (slip op., p. 22). MDG's protest on this issue is rejected.

2. GSC generally supports the petition, but requests that the grant of the petition be conditioned.[10]

(a) GSC requests the Commission to impose a refund condition for any costs charged to the proposed new subaccount of Account No. 191 that are subsequently reduced or eliminated for any reason. In particular, GSC cites to the modification made by the *Texas East-*

---

[9] MDG does not specify the issues it requests to be heard.

[10] Michigan Gas Utilities Company supports GSC's condition requests.

ern court where, with Commission agreement, a challenge under the general protest provisions of the NGPA can be held to show that an area rate clause is not subject to the presumptions of Order No. 94-A (slip op., p. 20). GSC's requested condition to impose a refund condition has merit and such a condition is imposed.

(b) GSC requests that a condition be imposed on acceptance of Panhandle's petition to preclude any transfer of the new sub-account's balance at the end of the 12-months collection period. GSC states that such a condition is necessary to assure that customers are not compelled to absorb more than their allocated share of the costs. We agree. The object of this petition is to deal equitably with the allocation of these costs. Those costs initially are divided to assess each customer's proper share of the amount due. To later charge those same customers for amounts not paid by others will require the paying customers to pay a disproportionate share of these costs. We will not condone that result. Panhandle in this order, is given the right to implement its direct billing procedure. If certain customers refuse to pay their proper share of these costs, Panhandle has the right to seek its legal remedy to collect those costs. Therefore, the risks of collection under this proposal should be borne by Panhandle and its stockholders. Those customers that pay their proper share should not be required to pay more. The direct billing mechanism will be amended to preclude the transfer of any balance in the new sub-account at the end of the 12-months period to any account that will require payment from customers other than those specific customers who owe any part or have refused to pay their proper proportionate share of these costs.[11]

---

[11] Our disposition of this issue also responds to the similar concern expressed by Michigan Gas Storage Company (Storage Company) in its protest of the filing.

(c) GSC asserts that "at least $4.9 million" of the costs involved here are "the result of fraud, abuse or gross imprudence, and should not be borne by [Panhandle's] customers" (Motion, p.4). GSC requests (as a condition) that Panhandle be directed to remove $4,924,055 (to be allocated pro-rata among its customers) from the amount to be collected at this time and to establish hearing procedures to determine whether those costs were prudently incurred to permit their recovery. GSC cites to Opinion No. 223 [12] where the Commission found that Panhandle had modified its purchased gas pattern to increase takes of high-cost gas from Trunkline during the period relevant to the production-related costs involved in the petition filed in this case. We agree and will set for hearing the issue of whether the purchase gas practice of Panhandle was prudent during the relevant time period to permit it to recover the $4.9 million costs from its customers. However, we will permit Panhandle to collect these amounts in its direct billing proposal subject to refund while the hearing procedures are ongoing.

(d) GSC has also requested that the supporting detail to be supplied by Panhandle, as well as the company's final report showing actual monthly billings to customers, be served upon GSC and all other parties to this proceeding. We agree that the final report submitted by Panhandle to the Commission should be served on all parties in this proceeding and we require Panhandle to do so. As to GSC's request for service of the supporting documentation, including the information required by section 271.1104(f) of the Commission's regulations, we will not require Panhandle to supply such information to all parties. The Commission's regulations require Panhandle to file all supporting documentation with the Commission so that it may be available, at the Commission, to the public.

---

[12] *Panhandle Eastern Pipe Line Co.*, 27 FERC ¶ 61,345 (1984); appeal docketed, *sub nom., Panhandle Eastern Pipe Line Co. v. F.E.R.C.*, No. 84-1468 (D.C. Cir., September 11, 1984).

Such supporting documentation is often voluminous and, for that reason, the Commission's practice has been to retain these materials at the Commission and permit the public to view them here.

3. Storage Company and Citizens Gas & Coke Utility (Citizens Gas) request the Commission to require Panhandle to base its monthly billings on actual cash payments made to producers before each billing and to preclude the inclusion of estimates in the bill. We will require Panhandle to base its bills on the amounts actually paid to producers prior to submission. However, the bill may be based on estimates to provide for equal monthly installments.[13]

4. Columbia Gas Transmission Corporation (Columbia) requests denial of the petition. It asserts that Panhandle's proposal is similar to that made by Tennessee Gas Pipeline Company, a Division of Tenneco Inc. (Tennessee) for authority to directly bill certain "extraordinary" retroactive gas purchase costs, which request was denied.[14] However, the *Tennessee* request is not similar to the request in this proceeding. In *Tennessee*, Tennessee proposed a permanent change to its tariff to allow for direct billing of any extraordinary item over $1 million. The Commission expressed its concern over the uncertainty of the meaning of "extraordinary item" and the fact that the $1 million minimum did not, in and of itself, appear to be an extraordinary amount in comparison to Tennessee's unrecovered gas costs. Here, however, Panhandle's proposal relates to a clearly defined, extraordinary out-of-period cost item appropriate for special treatment. Therefore, Columbia's argument on this issue is rejected.

---

[13] *See Transcontinental Gas Pipe Line Corp.*, 32 FERC ¶ 61,230 (1985).

[14] *Tennessee Gas Pipeline Co., a Division of Tenneco Inc.*, 29 FERC ¶ 61,150 (1984) (Tennessee).

Columbia also argues that Panhandle's proposal represents a fundamental departure from the Commission's rate treatment. Columbia is wrong. As an equitable and practical method of allocating cost responsibility, the Commission has approved similar direct billing proposals.[15]

Columbia states that its purchases from Panhandle have declined since the retroactive period, and argues that as a consequence, Panhandle's proposal will increase Columbia's gas costs. Columbia asserts that this frustrates the Commission's least-cost purchasing policy for pipelines, and obscures market signals. We find no merit in Columbia's protest. Contrary to Columbia's position, the direct billing mechanism avoids the distortion in market signals that would result if Panhandle were to pass these Order No. 94 amounts through its PGA and charge increased commodity rates to all its customers. Columbia's protest is rejected and its request to reject the petition is denied.

Discussion

Panhandle's proposal is for an equitable and practical method of allocating cost responsibility, similar to proposals which the Commission has approved in previous instances. *See, e.g., Transcontinental Gas Pipe Line Corporation*, 32 FERC ¶ 61,230 (1985) and *Tennessee Gas Pipeline Company*, 31 FERC ¶ 61,380 (1985). We remain cognizant of the concerns expressed by the protesters and other intervenors. We have conditioned our acceptance of Panhandle's petition, as appropriate, to meet the legitimate concerns of these parties.

With the conditions outlined below and discussed in the order, we will approve Panhandle's proposal, and grant the necessary waivers. This acceptance does not constitute a decision regarding the validity of any production-related cost allowances paid or collected as part of this procedure;

---

[15] *See, e.g., Transcontinental Gas Pipe Line Corp.*, 32 FERC ¶ 61,230 (1985); *Consolidated Gas Transmission Corp.*, 32 FERC ¶ 61,448 (1985).

any amounts so paid and collected are subject to refund.[16] Further, any amounts in dispute between Panhandle and its suppliers are automatically excluded from the direct billing procedure.

The Commission orders:

(A) Panhandle's petiton for direct billing filed in Docket No. RP85-203-000 on September 23, 1985, is granted as modified herein, and its direct billing procedure is made effective as of November 1, 1985, subject to the conditions set forth below:

(1) While it may initially base its twelve month billings on the total of actual plus estimated payments, Panhandle shall include in its monthly billing to its customers only amounts it has actually paid prior to the issuance of each such monthly billing;

(2) Panhandle shall compute interest on the production-related cost allowance payments it has made and not previously recouped in accordance with 18 C.F.R. § 154.38(d)(4)(iv)(c) (1984);

(3) Production-related cost allowances paid or collected as part of the direct billing procedure are subject to refund as provided in this order;

(4) Amounts in dispute between Panhandle and its suppliers are excluded from the direct billing procedure;

(5) Panhandle is required to file a report, within 30 days of the end of the 12-month billing period, that details Panhandle's actual monthly billings by customer, and the disposition of any remaining amounts; and Panhandle

---

[16] All of Panhandle's first seller suppliers have a continuing obligation to refund any amounts unlawfully collected in excess of the applicable allowances authorized by section 271.1104. *See* 18 C.F.R. § 270.101(e). Further, amounts that Panhandle pays in excess of the applicable NGPA maximum lawful price inclusive of such allowances are not permitted automatic passthrough under section 610(b)(1) of the NGPA, 15 U.S.C. § 3431(b)(1).

shall be required to serve this report on all parties to this proceeding;

(6) Panhandle shall not be allowed, in the event of nonpayment of these billed amounts by any customer to recover such amounts from its other customers; and

(7) Panhandle is required to file, within 15 days of each monthly billing, (a) the information required under section 271.1104(f) of the Commission's regulations, and (b) the relevant contractual provisions supporting the billing costs, to the extent that such information has not been previously filed at the Commission.

(B) Waiver of the Commission's regulations and Panhandle's tariff is granted to the extent necessary to permit Panhandle to implement its direct billing proposal as conditioned in this order.

(C) The late motions to intervene filed by Illinois Power, Northern Indiana and MDG are granted subject to the rules and regulations of the Commission; provided, however, that the participation of the intervenors shall be limited to matters affecting asserted rights and interests set forth in their motions to intervene; and provided, further, that the admission of such intervenors shall not be construed as recognition that they might be aggrieved by any order entered in this proceeding.

(D) Pursuant to the authority of the Natural Gas Act, particularly sections 4, 5, 8, and 15 thereof, and the Commission's rules and regulations, a public hearing shall be held concerning the purchasing gas practice issue identified in the text of this order.

(E) A presiding administrative law judge, to be designated by the Chief Administrative Law Judge for that purpose (18 C.F.R. 375.304), shall convene a prehearing conference in this proceeding to be held within 45 days after the issuance of this order, in a hearing or conference room of the Federal Energy Regulatory Commission, 825

North Capitol Street, N.E., Washington, DC 20426. The prehearing conference shall be held for the purpose of establishing procedures for the resolution of the issue set for hearing.

Commissioners Trabandt and Naeve voted present.

APPENDIX

Intervenors

Association of Business Advocating Tariff Equity

Citizens Gas & Coke Utility

Columbia Gas Transmission Corporation

East Ohio Gas Company

General Service Customer Group

Illinois Commerce Commission

Indiana Gas Company, Inc.

Michigan Consolidated Gas Company

Michigan Gas Storage Company

Michigan Gas Utilities Company

Process Gas Consumers Group

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. TA85-3-29-003, TA85-3-29-004, TA85-3-29-005, TA85-3-29-006, RP85-148-001, RP85-148-002, RP85-148-003, and RP85-148-004

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

ORDER DENYING REHEARING AND CLARIFICATION

(Issued November 14, 1985)

Before Commissioners: Raymond J. O'Connor, Chairman; A. G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

By order issued August 15, 1985, the Commission granted, with certain conditions, a petition by Transcontinental Gas Pipe Line Corporation (Transco) to institute a special procedure to directly bill its customers for about $127 million in retroactive production-related cost allowances it has paid or will pay its natural gas suppliers.[1]

Timely motions to intervene were filed by Brooklyn Union Gas Company (Brooklyn Union), Columbia Gas Transmission Corporation (Columbia), Public Service Electric and Gas Company (PSE&G), and Transco. Transco also filed a motion for clarification.

On October 15, 1985, the Commission granted rehearing solely for the purpose of further consideration. For the reasons stated below, we shall deny the requests

---

[1] 32 FERC ¶ 61,230 (1985).

for rehearing by Brooklyn Union, Columbia, PSE&G and Transco, and also deny Transco's motion for clarification.

Brooklyn Union's Application for Rehearing

In its application for rehearing, Brooklyn Union requests that the Commission issue an order requiring Transco to identify all disputed charges or payments for gathering and delivery allowances and to exclude these from the direct billing procedure until the disputes are resolved by issuance of a final non-appealable order.

In our August 15, 1985 order we observed that any amounts in dispute between Transco and its suppliers are automatically excluded from the direct billing procedure. We further observed that disputes as to the amounts that are directly billed can be raised before the Production-Related Costs Board.[2] Therefore, any dispute as to charges or payments which Brooklyn Union, or any other party, desires to raise may be addressed by the procedures set out in § 271.1105.[3]

Brooklyn Union further requests that with respect to those charges or payments which Transco claims are not disputed and have been made in reliance on an area rate clause, Transco should be ordered to provide the basis for its conclusion. Brooklyn Union requests this so that affected parties will have a meaningful opportunity to assess the reasonableness and validity of the claim that such charges are "expressly authorized" within the meaning of § 227.1105(a)(3) before they are billed. Here, Brooklyn Union claims, Transco should be ordered to identify all those charges or payments where the only authority for collection of gathering and delivery allowances is an area rate clause.

In support of its request, Brooklyn Union argues that the necessary result of the Fifth Circuit decision in

---

[2] 32 FERC ¶ 61,230, at p. 61,544.

[3] 18 C.F.R. § 271.1105 (1984).

Texas Eastern Transmission Corp. v. F.E.R.C.[4] is that area rate clauses do not, without more, automatically provide contractual authority for recovery of section 110 gathering allowances, and that this creates a category of potential "amounts in dispute" between Transco and its suppliers. Accordingly, Brooklyn Union contends that these amounts, under the express terms of the August 15 order, may not be included in the direct billing procedure.

In *Texas Eastern*, the court stated that the Commission "should amend its Order 94-A [*FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,419] to make clear that in a particular case, an aggrieved party is entitled to attempt to show that its area rate clause is not subject to the presumptions of Order 94-A."[5] The relevant presumption in Order No. 94-A is that an area rate clause *can* be used to collect delivery allowances.[6] Therefore, this order by the court, together with the relevant presumption in Order No. 94-A, does not call for prior Commission approval by Transco to bill its customers for section 110 gathering allowances incurred under area rate clauses of its contracts.

Furthermore, we emphasize again, as we did in the August 15 order, that we are only approving a billing procedure. In so doing, we make no decision on the validity of the allowances themselves. Any production-related cost allowances paid or collected as part of this procedure, and any amounts so paid and collected are subject to refund.[7]

---

[4] *Texas Eastern Transmission Corp. v. F.E.R.C.*, No. 83-4390 (5th Cir.) slip opinion issued August 19, 1985. (hereinafter referred to as the "Texas Eastern" decision)

[5] Texas Eastern at 6567.

[6] 18 C.F.R. § 271.1104(c)(4)(ii)(B).

[7] 32 FERC ¶ 61,230, at p. 61,544.

Finally, Brooklyn Union also requested the Commission, as it did in its original protest, to order Transco to submit revised tariff sheets which delineate the mechanism for evaluating and assessing Order 94 charges [*FERC States and Regulations, Regulations Preambles 1977-1981* ¶ 30,178]. Brooklyn Union states that the *Texas Eastern* decision creates additional concern over the lack of tariff sheets for these direct billing amounts since the decision raises serious questions as to whether or not contractual authority exists for the recovery of the section 110 gathering allowances Transco proposes to bill directly. We reject Brooklyn Union's request for the reasons given in our August 15 order.[8]

PSE&G's Motion for Rehearing

Transco has already collected $32.3 million of retroactive payments from its customers through its PGA. In order to treat its customers as if it had not previously passed through any of these retroactive allowances, Transco proposed to refund this $32.3 million amount to its customers and then, after reallocating these payments in accordance with the matching principal in its proposal, directly bill these amounts as if they had not been previously recovered.

PSE&G requests that the Commission, on rehearing, disallow refund of the $32.3 million already collected by Transco. Accordingly, PSE&G requests the Commission to require Transco to reduce its total retroactive Order No. 94-A amounts by the $32.3 million prior to allocating these remaining charges to Transco's customers.

In support of its request, PSE&G states that it will receive a refund of approximately $3.2 million and then pay surcharges related to the same principal amount of approximately $5.2 million. PSE&G asserts that this result was not contemplated in the Commission's discus-

---

[8] 32 FERC ¶ 61,230, at p. 61,545.

sion of Transco's refund obligation. PSE&G also claims that this result is unreasonable.

PSE&G raised a similar argument in its original protest. The direct billing procedure bases its charges on actual purchases in the retroactive period, rather than on future purchases. It necessarily follows that the amount calculated to be a customer's share of the retroactive allowances under the direct billing approach may be more (or less) than the PGA passthrough method. The direct billing procedure avoids the problem of customers who are now purchasing gas at much lower levels, than during the period when the production-related costs were incurred, from not absorbing their proper cost allocation of these costs. PSE&G is paying more because it purchased higher volumes of gas during the past billing period, when the costs were incurred, than it currently purchases.

Columbia's Motion for Rehearing

In its rehearing request, Columbia asserts that the Commission's decision in the August 15 order constitutes retroactive ratemaking. In support of this conclusion, Columbia argues that Order No. 94-A in no way addressed the issue of whether pipeline rates may be increased retroactively. Also, Columbia says the impact of the direct billing procedure is to retroactively increase the cost of gas Columbia purchased from Transco in the past.

Columbia's argument is a collateral attack on Order Nos. 94 and 94-A. In Order No. 94 the Commission provided that the delivery allowances which would eventually be allowed, except for intrastate gas, would be retroactive to the date Order No. 94 was issued.[9] This provision survived the scrutiny of the Fifth Circuit in the *Texas*

---

[9] Order No. 94 *FERC Statutes and Regulations, Regulations Preambles 1977-1981*, ¶ 30,178, at p. 31,230 (1980).

Eastern decision.[10] Furthermore, Order No. 94-A expressly authorized the collection of retroactively effective allowances.[11] Pursuant to section 601 (b)(1) and (c)(2) of the NGPA,[12] these amounts are deemed just and reasonable for purposes of the Natural Gas Act and are guaranteed passthrough by the interstate pipeline purchaser even though the charges relate to past deliveries of gas. Furthermore, as we observed in *Tennessee Gas Pipeline Co.*,[13] direct billing for retroactive section 110 allowances based on prior deliveries is consistent with our PGA regulations (18 C.F.R. § 154.38) insofar as it permits Transco to recover, after the fact, the difference between its previously estimated purchased gas costs and its actual purchased gas costs. Therefore, the authorization of the refund and the subsequent direct billing is not retroactive ratemaking, but merely a carrying out of existing rules.

Columbia further states that the August 15 order subverts the PGA regulations. Columbia asserts that in the past similar accounts were recovered through Account No. 191 on a 12-month surcharge over future sales. Columbia asks why these Order No. 94 retroactive costs are sufficiently different from other large retroactive costs such as to be appropriate for special treatment. These amounts are different than other amounts because they were authorized by special rule on a continuing, not a one time only, basis and are so large as to warrant special treatment.

As stated in the August 15 order, the Commission believes that Transco's proposal, concerning Order No. 94

---

[10] Texas Eastern at 6569.

[11] Order No. 94-A, *FERC Statutes and Regulations* ¶ 30,419, at p. 30,381 (1983).

[12] 15 U.S.C. §§ 3431(b)(1) and (c)(2).

[13] 31 FERC ¶ 61,308, at p. 61,694 (1985).

retroactive costs, is equitable. It is administratively effective, and meets our concern that pricing signals not be distorted by the influx of substantial retroactive Order No. 94-A costs. Furthermore, we noted that it will break the logjam that has existed and permit a relatively speedy passthrough of long overdue cost responsibility.

Also, Columbia states that the sole effect of the August 15 order is to enhance the marketability of Transco's gas supply. Here, Columbia relies on the reasons enunciacted in *Tennessee Gas Pipeline Corp.* (*Tennessee*).[14] In *Tennessee* the Commission rejected a settlement which would have eliminated a refund and, instead, reduced Tennessee's PGA. That decision was grounded on the equitable consideration that customers who are due a refund should be allowed to get it without being required to buy more gas first.[15]

Further, the Commission said that the proposal would artificially reduce Tennessee's PGA, which, in turn, would artificially enhance the marketability of its gas supply. Such a situation is not present in this case. Here, we are concerned with the passthrough of retroactively increased charges which would otherwise distort the *true* cost of Transco's gas supply. The method as proposed by Transco will equitably bill customers for the higher amounts they should have paid based on actual purchases during the past billing periods. Furthermore, this method will more accurately allow the true cost of current gas supplies to be reflected in Transco's PGA. Consequently, on balance, we find that the equities, and the need for proper market signals, outweigh any concerns that Transco may have had an ulterior motive regarding the marketability of its supplies.

---

[14] 32 FERC ¶ 61,086 (1985) *reh. den.* 32 FERC ¶ 61,347 (1985).

[15] *See Tennessee Gas Pipeline Co., a division of Tenneco Inc.*, 33 FERC ¶ 61,006, mimeo at 9 (October 9, 1985).

Finally, Columbia argues that the Commission's order will prevent clear market signals. Columbia argues that direct billing prevents a purchaser from knowing the true cost of its various suppliers' gas and from making an intelligent option to purchase the least cost supply if the Commission permits additional costs to be tacked on to such purchases several years later. Columbia's argument lacks merit. Order No. 94 put all pipelines on notice that purchased gas costs could increase by the amount of the section 110 allowances. Moreover, and as we noted above, direct billing prevents a distortion in market signals by permitting the true current cost of gas to be more accurately reflected in Transco's rates.

Transco's Motion for Clarification or Rehearing

Transco seeks clarification or, in the alternative, rehearing on the issue of the interest rate to be applied to the $32.2 million refund. In the August 15 order, the Commission stated that section 154.67(c)(2)[16] should apply to the refund of the $32.3 million in previously collected amounts, and that section 154.38(d)(iv)(c)[17] should apply for purposes of direct billing. Transco claims that the use of these two sections in the above manner causes Transco to under recoup approximately $940,000 of interest.

First, Transco requests that the Commission clarify that the $940,000 of additional interest on the $32.3 million of refunds should be included in the amounts to be directly billed by Transco. However, the direct billing methodology we approved requires interest amounts to be calculated consistent with how such amounts would be calculated had they been reflected in Transco's Account

---

[16] 18 C.F.R. § 154.67(c)(2) (1984).

[17] 18 C.F.R. § 154.38(d)(4)(iv)(c) (1984).

191.[18] Transco argues that the section 154.67(c)(2) interest rate for refunds is not appropriate in this case. Transco claims that these interest rates are intended to apply to collections which are later found not to have been justified, i.e., to instances of overcollections.

The $940,000 is the difference in interest Transco will pay its customers when it refunds the $32.3 million under section 154.67 and the interest it receives when it direct bills that amount with interest calculated under section 154.38. That difference in interest is attributable to the difference in calculating interest under those two sections. Under section 154.38, interperiod tax effects must be considered in calculating the interest.

The issue of the appropriate rate for refunds has been addressed in Order No. 47, Docket No. RM77-22 (September 10, 1979) *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,083. In Order No. 47, the Commission weighed various concerns of interested parties and then determined that customers are entitled to a refund based upon the entire overpayment.[19] This is now the general procedure applied to refunds. By allowing refund of the $32.3 million, we are recognizing that these amounts were prematurely collected. Hence, the customers are entitled to the Commission's general rate of interest on these refund monies.

Finally, Transco argues that the Commission intended to penalize Transco. The Commission does not intend to penalize Transco. However, as we have explained, the circumstances here require that we apply the rate of interest generally applicable to refunds with regard to the $32.3 million refund. We note that Transco came forward with the direct billing procedure, including the refund of previously collected amounts.

---

[18] *Natural Gas Pipeline Co. of America*, 30 FERC ¶ 61,138, at p. 61,246 (1985).

[19] Order No. 47 at p. 30,548.

The Commission orders:

(A) The request by Brooklyn Union for rehearing in Docket Nos. RP85-148-001 and TA85-3-29-003 is denied.

(B) The request by Columbia for rehearing in Docket Nos. RP85-148-002 and TA 85-3-29-004 is denied.

(C) The request by PSE&G for rehearing in Docket Nos. RP85-148-003 and TA85-3-29-005 is denied.

(D) The request by Transco for rehearing, or in the alternative, clarification in Docket Nos. RP85-148-004 and TA85-3-29-006 is denied.

Commissioners Trabandt and Naeve voted present.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP85-170-002

TEXAS EASTERN TRANSMISSION CORPORATION

NOTICE OF DENIAL OF REHEARING

(Issued November 25, 1985)

By Direction of the Commission: Kenneth F. Plumb, Secretary.

Take notice that the Commission agreed at its meeting of November 20, 1985, to take no action on the request for rehearing of its September 30, 1985 order granting petition to institute direct billing (32 FERC ¶ 61,493) filed by Columbia Gas Transmission Corp. on October 25, 1985. Accordingly, the request for rehearing is denied pursuant to Section 19(a) of the Natural Gas Act, 15 U.S.C. § 717r(a), and Rule 713(f) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(f) (1985).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP85-181-001

TEXAS GAS TRANSMISSION CORPORATION

NOTICE OF DENIAL OF REHEARING

(Issued December 13, 1985)

Kenneth F. Plumb, Secretary.

Take notice that the Commission agreed at its meeting of December 4, 1985, to take no action on the request for rehearing of its October 16, 1985 order granting petition to institute direct billing (33 FERC ¶ 61,032) filed by Columbia Gas Transmission Corp. on October 25, 1985. Accordingly, the request for rehearing is denied pursuant to Section 19(a) of the Natural Gas Act, 15 U.S.C. § 717r(a), and Rule 713(f) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(f) (1985).

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RP85-202-001

TRUNKLINE GAS COMPANY

ORDER DENYING REHEARING

(Issued January 15, 1986)

Before Commissioners: A. G. Sousa, Acting Chairman; Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

By order issued November 14, 1985,[1] the Commission granted, with certain conditions, a petition by Trunkline Gas Company (Trunkline) to institute a special procedure to directly bill its customers for approximately $107 million in retroactive production-related cost allowances it has paid or will pay its natural gas suppliers under section 110(a) of the Natural Gas Policy Act of 1978 (NGPA)[2] and section 271.1104[3] of the Commission's NGPA rules.

Columbia Gas Transmission Corporation's Request For Rehearing

On December 16, 1985, Columbia Gas Transmission Corporation (Columbia) filed a request for rehearing of the Commission's November 14, 1985 order. Many of the arguments presented by Columbia were considered and

---

[1] 33 FERC ¶ 61,217 (1985).

[2] 15 U.S.C. § 3320(a)(2).

[3] 18 C.F.R. § 271.1104 (1984).

rejected in our November 14, 1985 order. The Commission finds that Columbia has presented no new arguments that would warrant departure from our November 14, 1985 order.

In its request for rehearing, Columbia asserts that the Commission's decision in our November 14 order constitutes retroactive ratemaking. Columbia argues that Order No. 94[4] failed to address whether pipeline rates may be increased retroactively. Also, Columbia states that the impact of the direct billing procedure is to retroactively increase the cost of gas Columbia purchased from Trunkline in the past.

Columbia's argument is a collateral attack on Order No. 94 and 94-A.[5] In Order No. 94 the Commission provided that the gathering and compression allowances which would eventually be allowed, would be retroactive to the date Order No. 94 was issued.[6] Furthermore, Order No. 94-A expressly authorized the collection of retroactively effective allowances.[7] The argument that direct billing constitutes retroactive ratemaking was fully considered and rejected in *Tennessee Gas Pipeline Co.* (Tennessee),[8] wherein we approved a similar direct billing proposal submitted by Tennessee.

In its request for rehearing, Columbia states that retroactive gas cost increases have historically been recovered through the PGA mechanism, and questions why Order No. 94 retroactive costs are to be accorded special

---

[4] Order No. 94, *FERC Statutes & Regulations, Regulations Preambles 1977-1981* ¶ 30,178 (1980).

[5] Order No. 94-A, *FERC Statutes & Regulations* ¶ 30,419, at p. 30,381 (1983).

[6] *FERC Statutes & Regulations, Regulations Preambles 1977-1981* ¶ 30,178, at p. 31,230 (1980).

[7] *FERC Statutes & Regulations* ¶ 30,419, at p. 30,381 (1983).

[8] 31 FERC ¶ 61,308, at p. 61,694 (1985).

treatment. As the Commission has stated in prior orders,[9] these retroactive Order No. 94 amounts are distinguishable from other large retroactive costs because they were authorized by special rule on a continuing, not a one-time-only basis, and are so large as to warrant special treatment. Further, Trunkline's direct billing procedure will permit it to assign production-related costs to its customers in proportion to their actual purchases of gas during the retroactive period, instead of on the basis of their future purchases from Trunkline (as would be the case if recovery was through a PGA surcharge).

Further, Columbia states that the effect of our November 14, 1985, order is to enhance the marketability of Trunkline's gas. In support of this assertion, Columbia relies on the Commission's decision in *Tennessee Gas Pipeline Co.*,[10] where the Commission rejected a settlement which would have eliminated a Tennessee section 4 rate case refund and instead, reduced the applicable surcharge in Tennessee's PGA. The Commission said that Tennessee's proposal would artificially reduce its PGA, and, in turn, artificially enhance the marketability of its gas supply. Trunkline's direct billing proposal does not present a similar situation. Here, we have permitted Trunkline to bill its customers for retroactive charges which otherwise would distort the true cost of Trunkline's current gas supply. Our November 14, 1985 order accepted Trunkline's proposal as an equitable and practical method of allocating cost responsibility.

Finally, Columbia argues that approval of the direct billing procedure penalizes Columbia for following a least-cost purchasing policy and prevents a purchaser from knowing the true cost of its suppliers' gas. We reject Columbia's argument. The promulgation of Order No.

---

[9] *See Transcontinental Gas Pipe Line Corp.*, Order Denying Rehearing, 33 FERC ¶ 61,213 (1985).

[10] 32 FERC ¶ 61,086 (1985), *reh. den.* 32 FERC ¶ 61,347 (1985).

94 put pipeline companies on notice that purchased gas costs could increase by the amount of the production-related costs. As stated in our November 14 order, the Commission believes that direct billing prevents a distortion in market signals by permitting the true current cost of gas to be reflected in Trunkline's rates.

For the reasons stated above, we find Columbia's arguments to be without merit and we therefore deny its request for rehearing.

The Commission orders:

The request by Columbia for rehearing is denied.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket Nos. RP85-203-001 and RP85-203-002

PANHANDLE EASTERN PIPE LINE COMPANY

ORDER DENYING REHEARING

(Issued February 20, 1986)

Before Commissioners: Anthony G. Sousa, Acting Chairman; Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

By order on November 14, 1985,[1] the Commission granted, with certain conditions, a petition by Panhandle Eastern Pipe Line Company (Panhandle) to institute a special procedure to directly bill its customers for retroactive production-related cost allowances it has paid or will pay to its producers and pipeline suppliers. These amounts were incurred over the past period from July 25, 1980 through February 28, 1985, under section 110 (a) of the Natural Gas Policy Act of 1978 (NGPA)[2] and section 271.1104 of the Commission's NGPA rules.[3] On December 16, 1985, Columbia Gas Transmission Corporation (Columbia) and the Municipal Defense Group (MDG) filed requests for rehearing.[4] For the reasons stated below, rehearing will be denied.

---

[1] 33 FERC ¶ 61,218 (1985).

[2] 15 U.S.C. § 3320(a)(2).

[3] 18 C.F.R. § 271.1104(1984).

[4] The Commission issued an order granting rehearing solely for the purpose of further consideration on January 15, 1986.

Requests for Rehearing

In their requests for rehearing, MDG and Columbia assert that the Commission's decision constitutes retroactive ratemaking. In addition, Columbia asserts that retroactive gas cost increases have historically been recovered through the PGA mechanism; that a direct-billing mechanism would frustrate the Commission's least-cost purchasing policy for pipelines; and that such a mechanism would result in a distortion of market signals.

All of the arguments presented by MDG and Columbia have been fully considered and rejected in previous Commission orders issued in *Trunkline Gas Co.*,[5] *Tennessee Gas Pipeline Co.*,[6] and *Transcontinental Gas Pipe Line Corp.*,[7] which authorized the institution of direct-billing procedures for retroactive production related cost allowances. In those orders, and in the November 14, 1985 order in the subject proceeding, we stated that a claim of retroactive ratemaking constitutes a collateral attack on Order Nos. 94[8] and 94-A.[9] In Order No. 94 the Commission provided that the gathering and compression allowances which would eventually be allowed would be retroactive to the date Order No. 94 was issued. Furthermore, Order No. 94-A expressly authorized the collection of retroactively effective allowances.

Concerning the arguments presented by Columbia with respect to the flow-through of these costs in the PGA, the Commission stated in the November 14, 1985 order that

---

[5] 33 FERC ¶ 61,217 (1985); *reh'g denied*, 34 FERC ¶ 61,021 (1986).

[6] 31 FERC ¶ 61,308, at p. 61,695 (1985).

[7] 32 FERC ¶ 61,230 (1985), *reh'g denied*, 33 FERC ¶ 61,213 (1985).

[8] Order No. 94, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,178 (1980).

[9] Order No. 94-A, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,419.

the direct-billing mechanism avoids the distortion of market signals that would result if Panhandle were to pass through Order No. 94 amounts in its PGA and charge increased commodity rates to all of its customers.

The arguments presented by MDG and Columbia here were considered and rejected in our order of November 14, 1985 when we considered their protests. The Commission finds that MDG and Columbia have presented no new arguments or support for their positions that would warrant departure from our November 14, 1985 order. Accordingly, the requests for rehearing filed by MDG and Columbia shall be denied.

The Commission orders:

The requests for rehearing filed by MDG and Columbia are denied.

STATUTORY PROVISIONS

NATURAL GAS POLICY ACT OF 1978

Section 110(a), 15 U.S.C. § 3320(a). Treatment of State severance taxes and certain production-related costs

(a) Allowance for State severance taxes and certain production-related costs

Except as provided in subsection (b) of this section, a price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this part if such first sale price exceeds the maximum lawful price to the extent necessary to recover—

(1) State severance taxes attributable to the production of such natural gas and borne by the seller, but only to the extent the amount of such taxes does not exceed the limitation of subsection (b) of this section; and

(2) any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission.

Section 601(c)(2), 15 U.S.C. § 3431(c)(2). Coordination with the Natural Gas Act

* * * *

(c) Guaranteed passthrough

(2) Recovery of just and reasonable prices paid

For purposes of sections 4 and 5 of the Natural Gas Act [15 U.S.C. 717c, 717d], the Commission may not deny any interstate pipeline recovery of any amount paid with respect to any purchase of natural gas if—

(A) under subsection (b) of this section, such amount is deemed to be just and reasonable for

purposes of sections 4 and 5 of such Act [15 U.S.C. 717c, 717d], and

(B) such recovery is not inconsistent with any requirement of any rule under section 3341 of this title (including any amendment under section 3342 of this title),

except to the extent the Commission determines that the amount paid was excessive due to fraud, abuse, or similar grounds.

Section 4, 15 U.S.C. § 717c. Rates and charges

(a) Just and reasonable rates and charges

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) Undue preferences and unreasonable rates and charges prohibited

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Filing of rates and charges with Commission; public inspection of schedules

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Changes in rates and charges; notice to Commission

Unless the Commisison otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Authority of Commission to hold hearings concerning new schedule of rates

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the

rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding intiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may; by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Section 5(a), 15 U.S.C. § 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or

sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

Supreme Court, U.S.
FILED
JUN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-2001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
Petitioners,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The District Of Columbia Circuit

BRIEF IN OPPOSITION OF RESPONDENT, MUNICIPAL DEFENSE GROUP

CHARLES F. WHEATLEY, JR.
Counsel of Record
PHILIP B. MALTER
WHEATLEY & RANQUIST
34 Defense Street
Annapolis, MD 21401
(301) 266-7524

Attorneys for The Municipal Defense Group

July 25, 1990

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the decision of the court below precluding retroactive ratemaking by natural gas pipeline companies regulated under the Natural Gas Act, should be reviewed, where the court followed the plain meaning of the statute and the precedents of both this Court and the circuit courts of appeal to reach a result that is consistent with the basic congressional objective to protect gas consumers.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
COUNTERSTATEMENT	2
RESPONSE TO ALLEGED REASONS FOR GRANTING THE WRIT	9
A. The Decision Below Is Fully Consistent With The Plain Meaning Of The Statute And The Time-Honored Precedents Of The Other Circuit Courts Of Appeal, As Well As The Supreme Court	9
B. That The Case Below Does Not Represent An Important Question For This Court To Consider Is Underscored By The Fact That The Statutory Interpretation Of The Lower Court Is Not Unique, But Consistent With A Long Series Of Cases Preceding And Succeeding The Decision Below In Both Gas And Electric Cases Involving Both The D.C. And Other Circuits	20
C. There Is No Conflict Between The Decision Below And That Of Any Other Circuit	21
APPENDIX	i

TABLE OF AUTHORITIES

Page

JUDICIAL DECISIONS:

Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982) 10

Arkansas Louisiana Gas Company v. Hall, 453 U.S. 571 (1981) ..... *passim*

Atlantic Refining Company v. Public Service Commission of the State of New York, 360 U.S. 378 (1959) 5

Associated Gas Distributors v. FERC, 898 F.2d 809 (D.C. Cir. 1990) 25

Belco Petroleum Corp. v. FERC, 589 F.2d 680 (D.C. Cir. 1978) 6

California v. Taylor, 353 U.S. 553 (1957) 7

Carr v. District of Columbia, 543 F.2d 917 (D.C. Cir. 1976) 19

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 9

City of Piqua v. FERC, 610 F.2d 950 (D.C. Cir. 1979) 17

Columbia Gas Transmission Corp. v. FERC, 895 F.2d 791 (D.C. Cir. 1990) (*"Columbia II"*) 6,7,27

Columbia Gas Transmission Corp. v. FERC, 831 F.2d 1135 (D.C. Cir. 1987) (*"Columbia I"*) ... *passim*

Electrical District No. 1 v. FERC, 774 F.2d 490 (D.C. Cir. 1985) ..... *passim*

FPC v. Hope Natural Gas Company, 320 U.S. 591 (1944) 11,21

FPC v. Tennessee Gas Transmission Co., 371 U.S. 145 (1962) 6

Giordenello v. United States, 357 U.S. 480 (1958) 7

Goland v. Central Intelligence Agency, 607 F.2d 339 (D.C. Cir. 1978) 19

Table of Authorities Continued

	Page
Green v. Commissioner of Internal Revenue, 707 F.2d 404 (9th Cir. 1983)	10
Hall v. FERC, 691 F.2d 1184 (5th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983)	6,17
Interstate Natural Gas Association of America v. FERC, 756 F.2d 166 (D.C. Cir. 1985)	6
Lewis v. Hegstrom, 767 F.2d 1371 (9th Cir. 1985)	10
Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 58 U.S.L.W. 4862 (June 19, 1990) (No. 89-624)	*passim*
Montana-Dakota Utilities Company v. Northwestern Public Service Company, 341 U.S. 246 (1951)	11,21
Moragne v. State Marine Lines, 398 U.S. 375 (1970)	7
Nantahala Power Company & Light Company v. Thornburg, 476 U.S. 953 (1986)	27
Permian Basic Area Rate Cases, 390 U.S. 747 (1968)	9,10
Phillips Petroleum Co. v. FERC, 902 F.2d 795 (10th Cir. 1990)	22
Public Service Company of New Mexico v. FERC, 857 F.2d 833 (D.C. Cir. 1988)	13
Public Service Company of New Mexico v. FERC, 832 F.2d 1201 (10th Cir. 1987)	13,15,21,22
Shell Offshore Inc. v. FERC, 858 F.2d 1147 (5th Cir. 1988)	26,27
Texas Eastern Transmission Corp. v. FERC, 769 F.2d 1053 (5th Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986)	*passim*
Transwestern Pipeline Company v. FERC, 897 F.2d 570 (D.C. Cir. 1990)	19

Table of Authorities Continued

Page

West Virginia Oil & Gas Co., Inc. v. George E. Breece Lumber Co., Inc., 213 F.2d 702 (5th Cir. 1954) 19

ADMINISTRATIVE DECISIONS:

Kansas Gas & Electric Co.,34 F.E.R.C. (CCH) ¶ 61,288 (1986) 15

STATUTES & REGULATIONS:

Federal Power Act
Sec. 205, 16 U.S.C. § 824d (1985) ..... *passim*
Sec. 206, 16 U.S.C. § 824e (1985) ..... *passim*

Natural Gas Act
Sec. 4, 15 U.S.C. § 717c (1976) ..... *passim*
Sec. 4(d), 15 U.S.C. § 717c(d) (1976) ..... *passim*
Sec. 4(e), 15 U.S.C. § 717c(e) (1976) 5
Sec. 5, 15 U.S.C. § 717d (1976) ..... *passim*

Natural Gas Policy Act
Sec. 110(a), 15 U.S.C. § 3320a (1982) ..... *passim*
Sec. 503, 15 U.S.C. § 3413(e) (1982) 4
Sec. 601, 15 U.S.C. § 3431 (1989) 6

Federal Energy Regulatory Commission, Stats. & Regs. (CCH) ¶ 30,026 (1978) 4

Federal Rules of Civil Procedure
28 U.S.C. 60(b) (1990) 19

18 C.F.R. § 154.16(b) (1988) 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-2001

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*
Petitioners,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT, MUNICIPAL DEFENSE GROUP

The Respondent, Municipal Defense Group ("MDG"), is an ad hoc group of ten small municipal publicly-owned gas systems[1] who, during the time period at issue here, purchased the totality of their gas supply from one of the Petitioners, Panhandle Eastern Pipe Line Company, and distributed that gas to mostly residential customers within their service areas.

---

[1] The Municipal Defense Group consists of the Cities of Clarence, Fulton, Hermann, Macon, Monroe City, Paris, Perry and Shebina, Missouri, and Edinburg and Stonington, Illinois.

COUNTERSTATEMENT

The Petitioners misstate the facts when they allege that the court below held that the Commission was "powerless to effect an admittedly equitable distribution of certain gas costs." Petition at 3. The Petitioners err in that the court did not hold that the Commission was "powerless." The court simply ruled that allegations of equity cannot empower an agency to ignore explicit legislative commands.[2] No party, in briefs or in oral argument before the D.C. Circuit, challenged, in any fashion, MDG's position that the Commission had the power to reopen and reconsider its Order 94 series and eliminate the retroactive payment from the pipelines to the producers. Attached Appendix at 6a, n.13.[3]

Secondly, the Commission's Order does not produce an "admittedly equitable distribution." MDG showed, without any challenge below, that the Commission's decision was not only inconsistent with law, but also

---

[2] As is discussed in greater detail, *infra* at 8, n.7, this holding of the D.C. Circuit is virtually identical to the recent conclusion of this Court in *Maislin Industries U.S., Inc. v. Primary Steel, Inc., 58 U.S.L.W. 4862, (June 19, 1990), No. 89-624 (Maislin Industries).*

[3] Indeed, at page 16, the petition itself cites to this proposition:

> This reflects the long established rule that the Commission has ample power to "undo what is wrongfully done by virtue of its order." *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965); *accord: Office of Consumers' Counsel v. FERC*, 826 F.2d 1136 (D.C. Cir. 1987); *Tennessee Valley Municipal Gas Ass'n v. FPC*, 470 F.2d 446 (D.C. Cir. 1972).

in violation of the legitimate concerns of fairness and equity. Attached Appendix at 1a-6a.

The Petitioners' statement also alleges: "The costs in question are substantial, totalling approximately $1.5 billion for the industry as a whole. . ." Petition at 3. While MDG acknowledges that $1.5 billion has a "substantial" ring to it, it must be placed into the perspective of: (1) the $1.5 billion is approximately 1% of the operating revenues of the industry for the relevant time period; and (2) it was far less than the extra returns the Commission had allowed the pipeline industry to compensate that industry for bearing gas supply related risk. Attached Appendix at 2a-4a.

The Petitioners' statement regarding the statutory and regulatory background alleges that the Commission precluded interim Natural Gas Policy Act (NGPA), Sec. 110(a), 15 U.S.C. § 3320a (1982) costs from being collected by the producers:

> In 1980, FERC issued its Order No. 94, 45 Fed. Reg. 53,099 (1980), a rulemaking order that among other things imposed a moratorium on the collection by producers of the costs attributable to compression and gathering of gas. A moratorium was necessary, the Commission concluded, because the appropriate allowance for these activities presented a complex question and the Commission needed time to develop a factual basis upon which allowances could be authorized generically, . . .

Petition at 4-5. Petitioners also suggest that interim collection of Section 110 costs was mandated by the "explicit" provisions of the NGPA. However, the truth

of the matter is that the Section 110 costs allowed, as well as their interim collection, were "rights" created by the Commission, not Congress. When an earlier Commission addressed the issue of Section 110 costs, it stated: "The statute does not require the Commission to automatically permit the recovery of all such costs, but leaves to the discretion of the Commission whether to grant the authority to sellers to recover such costs." FERC Stats. & Regs. (CCH) ¶ 30,026 at 30,184 (1978). Moreover, nowhere in the NGPA is there the right of the producers to collect interim Section 110 costs prior to the final determination by the Commission.[4]

While it is true that the Fifth Circuit in *Texas Eastern Transmission Corp. v. FERC*, 769 F.2d 1053 (5th Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986) (*"Texas Eastern"*) sustained the retroactive collection of interim Section 110 costs and required that the same retroactive treatment be given other Section 110 costs, the statutory language makes it clear that the Commission was not obligated to permit retroactive collection of any interim Section 110 costs.

---

[4] Inasmuch as the NGPA does provide for interim collection of other costs prior to the final Commission determination, Sec. 503, 15 U.S.C. § 3413(e) (1982) pursuant to the doctrine of *expressio unius est exclusio alterius*, interim collection of Section 110 costs was, therefore, not intended. Only producers selling old gas dedicated to interstate commerce prior to November 8, 1978 had rights pursuant to Section 4 of the NGA to file for and to collect Section 110 prices, prior to Commission determination thereof. However, the earlier Commission recognized that it did not have to accept a filing for these Section 110 costs, inasmuch as it was under no obligation to permit any Section 110 costs for old gas. FERC Stats. and Regs. (CCH), ¶30,026 at 30,180 (1978).

Moreover, the preceding discussion should not obscure the fact that Section 110 of the NGPA is *not* involved in the instant proceeding.

The Natural Gas Act, 15 U.S.C. § 717, *et seq.* ("NGA or Act"), was enacted in 1938 "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Company v. Public Service Commission of New York*, 360 U.S. 378, 388 (1959). While the overall objective was to protect consumers, the Act had some provisions which were clearly biased towards the utilities. Pursuant to Section 4(e), 15 U.S.C. § 717c(e) (1976) the utility had the right to place a rate into effect after a suspension period of no greater than five months. However, as drafted, and for all the relevant period involved herein, the Act had no similar provision governing rate decreases. To offset this, Congress wrote into the Act a specific bias favoring retroactive rate reductions, but not retroactive rate increases:

> It is not insignificant that the Commission acted consistently with the statutory bias favoring retroactive rate reductions but not retroactive rate increases, a bias Congress wrote directly into the statute:
>
> > "[T]he Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates

> are unjust, unduly discriminatory, preferential, otherwise unlawful, or not the lowest reasonable rates."

Belco Petroleum Corp. v. FERC, 589 F.2d 680, 687 (D.C. Cir. 1978).

It was fully contemplated that, pursuant to this bias, the pipelines might not be able to charge consumers rates that are otherwise fully just and reasonable. *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 152-153 (1962); *Electrical District No. 1 v. FERC*, 774 F.2d 490 (D.C. Cir. 1985); *Interstate Natural Gas Association of America v. FERC*, 756 F.2d 166, 171 (D.C. Cir. 1985). Because of this, "the Commission has a duty to protect the consumer even if such results in some 'injustice' to [the pipelines]." *Hall v. FERC*, 691 F.2d 1184, 1193 (5th Cir. 1982).

The Petitioners also alleged that "the guaranteed passthrough" provision of the NGPA Section 601, 15 U.S.C. § 3431 (1989) requires the Commission to pass through all Section 110 costs regardless that the passthrough might violate the filed rate doctrine and the prohibition against retroactive ratemaking. Petitioners also allege that there are no allegations present in the instant case that the Section 110 costs are not subject to this guaranteed passthrough. Petition at 6.

However, this is a complete misrepresentation of the allegations which were before the court both in *Columbia Gas Transmission v. FERC*, 831 F.2d 1135 (D.C. Cir. 1987) ("*Columbia I*") and *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791 (D.C. Cir. 1990) ("*Columbia II*"). The attached appendix, pages 10a-11a, are portions of the Municipal Defense Group's

Initial Brief to the Court in *Columbia I*. As can be seen therein, MDG established that the guaranteed passthrough provision does *not* apply to retroactive rates, or in any way grant the Commission the power to override the filed rate doctrine, or the prohibition against retroactive ratemaking. MDG essentially reiterated this showing in its brief in *Columbia II* with the addition of updated citations. Attached Appendix at 7a-8a. At no time during the briefing and oral argument in either *Columbia I* or *Columbia II* did any party offer any rebuttal to MDG's showing.[5]

In the Petition at page 9, note 5, the Petitioners state that the "lead Petitioner" before the court of appeals, Columbia Gas Transmission Corporation, had notice in fact of the Order 94 series. MDG submits, however, that Columbia Gas Transmission Corporation was the "lead petitioner" only because, alphabetically, "C" comes before "M." However, as MDG explained to the court of appeals:

> MDG is comprised of . . . small municipal systems and, as such, essentially represents the ultimate residential consumer whose protection is the primary purpose of the Natural Gas Act. Atlantic Refining Company v. Public Service Commission of New York, 360 U.S. 378, 388 (1959). Thus in terms of the interests represented, MDG submits that it is the *most* significant party hereto.

---

[5] The Petitioners' failure to even attempt to rebut MDG's arguments established the issue as substantively unrebutted before the lower court and may not be substantively challenged for the first time here. Moragne v. State Marine Lines, 398 U.S. 375, 378 n.1 (1970); Giordenello v. United States, 357 U.S. 480, 488 (1958); California v. Taylor, 353 U.S. 553, 556 n.2 (1957).

MDG Reply Brief at p. 10, n.6. And, in contrast to the alleged "lead petitioner," MDG had no notice of the Order 94 series, either *de facto* or *de jure*.[6]

As a last correction to Petitioners' statement of the case, MDG notes that Petitioners allege that the court below concluded that there was "no flexibility . . . for the Commission 'to mitigate the damages its errors of judgment or rulemaking delays might have caused.' " Petition at 10. However, as indicated earlier, *supra* at 2, this is a misstatement of the court's ruling. The court concluded simply that allegations of equities are insufficient to permit the Commission to "ignore explicit legislative commands" in order to mitigate such alleged damages.[7]

However, as MDG maintained before the court below with *no* challenge from any other party, and continues to maintain here, one available response of the Commission in the circumstances of the court's opinion would be to reopen the Order 94 series and eliminate the retroactive payment to producers. Such action on the part of the Commission would indeed "mitigate the damages its errors of judgment or rulemaking delays might have caused." Attached Appendix at 6a n.13.

---

[6] This is discussed in greater detail, *infra* at 23-25.

[7] There is certainly nothing challengable about the court's conclusion. The conclusion is virtually identical to that made by this Court in *Maislin Industries*, 58 U.S.L.W. at 4864-4865.

RESPONSE TO ALLEGED REASONS FOR GRANTING THE WRIT

A. The Decision Below Is Fully Consistent With The Plain Meaning Of The Statute And The Time-Honored Precedents Of The Other Circuit Courts Of Appeal, As Well As The Supreme Court

Petitioners commenced their statement of Reasons For Granting the Writ by attempting to distinguish this Court's very recent decision in *Maislin Industries, supra.* While it is true that the scope of the filed rate doctrine applicable to the Interstate Commerce Commission ("ICC") is not identical to the filed rate doctrine applicable to the FERC, in most respects, *Maislin Industries* is dispositive of the issues advanced in the Petition.

At 12-16, the Petitioners commence with a citation to *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968): "The Commission 'must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests,' " and close with a citation to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984): "that courts should defer to a regulatory agency's interpretation of the organic statutes it administers."

As thus presented, the issue is virtually identical to that before the Court in *Maislin Industries*. There, the ICC argued that its

> conclusion is entitled to deference because [the statute] does not specifically address the types of practices that are to be considered unreasonable and because its construction is

> rational and consistent with the statute. *See Chevron U.S.A., Inc. v. Natural Resources Defenses Council, Inc.*, 467 U.S. 837, 843 (1984).

58 U.S.L.W. at 4865. However, the Court rejected the ICC's argument because it was inconsistent with the language of the statute and the historical interpretation of the filed rate doctrine by the Court. This, too, is the situation in the instant case.

Similarly, just as the Court in *Permian Basin* recognized that the Commission's latitude was constrained by "pertinent constitutional and statutory commands," this Court, as well as the courts of appeal has always recognized that the filed rate doctrine and the rule against retroactive ratemaking prohibit what the Commission attempted to do in these proceedings.

To begin with, in its decisions below, the Commission attempted to read the Natural Gas Act in a manner which violates rules of statutory construction.[8] The Commission attempted to read Section 4, 15 U.S.C. § 717c (1976), of the Act in a manner which would make it totally inconsistent with Section 5, 15 U.S.C. § 717d (1976), of the Act. The court below, however, read the two sections in a manner so that they were consistent with one another.

At 13, Petitioners quote the language from Section 4(d) of the NGA:

---

[8] The courts should strive to read different sections of the same statute as consistent with one another. *See* Lewis v. Hegstrom, 767 F.2d 1371 (9th Cir. 1985); Green v. Commissioner of Internal Revenue, 707 F.2d 404 (9th Cir. 1983); Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982).

> *Unless the Commission otherwise orders*, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and the public . . . . *The Commmission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for* by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

15 U.S.C. § 717c(d) (emphasis in Petition). However, Petitioners do not quote the text of Section 5 of the NGA. Under that latter section, the Commission is empowered, after a hearing, to determine a just and reasonable rate. . .

> to be *thereafter* observed and in force, and shall fix the same by order: *provided, however*, that the Commission shall have *no power* to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; . . . .

15 U.S.C. § 717d (emphasis in original and added).

From the very enactment of the NGA, this Court has recognized that Section 5 prohibits the Commission from retroactively changing rates or ordering reparations. *FPC v. Hope Natural Gas Company*, 320 U.S. 591, 618 (1944); *Montana-Dakota Utilities Com-*

pany v. Northwestern Public Service Company, 341 U.S. 246, 251 (1951) ("*Montana-Dakota*").

More recently, in *Arkansas Louisiana Gas Company v. Hall*, 453 U.S. 571, 578 (1981) ("*Arkansas Louisiana*"), this Court underscored the fact that Section 5 deprived the Commission of *any* power to engage in retroactive ratemaking:

> Not only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has *no power* to alter a rate retroactively. When the Commission finds a rate unreasonable, it "shall determine the just and reasonable rate . . . to be *thereafter* observed and in force." § 5(a), 52 Stat. 823, 15 U.S.C. §717d(a) [15 USCS § 717d(a)] (emphasis added).

(Footnote omitted). All the D.C. Circuit did in the proceedings below was apply this Court's decision in *Arkansas Louisiana* to the facts of the instant proceeding:

> [T]he effect of the orders is quite clear: downstream purchasers are expected to pay a surcharge, over and above the rates on file at the time of sale, for gas they had already purchased. However described, this constitutes a retroactive rate increase that we find to be prohibited by the NGA.
>
> * * *
>
> In its discussion of the doctrine in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 576-

78, 101 S.Ct. 2925, 2929-30, 69 L.Ed.2d 856 (1981), the Supreme Court notes that

> The [Natural Gas] Act bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and prevents the Commission itself from imposing a rate increase for gas already sold.

Id. at 578, 101 S.Ct. at 2931. Moreover, the Court explicitly states, in a footnote, that "the Commission may not *impose* a retroactive rate alteration and, in particular, may not order reparations. . . ." *Id.* at n.8.

Columbia I, 821 F.2d at 1140.

Moreover, this application of the Court's decision in *Arkansas Louisiana* was not unique to the instant proceeding, or even to the D.C. Circuit. The same conclusion, *i.e.*, that Section 5, and its analog under the Federal Power Act, Section 206, 16 U.S.C. § 824(e) (1985), absolutely prohibit the Commission from retroactively modifying rates, was contained in D.C. Circuit Opinions in *Electrical District No. 1 v. FERC*, 774 F.2d 490 (D.C. Cir. 1985) and *Public Service Company of New Mexico v. FERC*, 857 F.2d 833 (D.C. Cir. 1988), as well as the Tenth Circuit's decision in *Public Service Company of New Mexico v. FERC*, 832 F.2d 1201 (10th Cir. 1987).

The plain meaning of Section 4 is that the waiver provision applies only to the requirement of 30 days' advance notice and nothing more. The language itself is totally prospective and is not susceptible to being viewed as sanctioning the retroactive modification of

rates for gas sold many years in the past. The court below interpreted Section 4 in a manner to make it consistent with Section 5, *i.e.*, that the Commission may waive notice of a new rate filing where good cause is shown, but never in a situation which would involve the retroactive increase in rates which is prohibited by Section 5.

The Commission and the Petitioners, on the other hand, are attempting to read Section 4 in a manner inconsistent with and in total contradiction of Section 5. Notwithstanding that Section 5 emphatically states that the Commission shall have "no power" to retroactively increase rates, the Commission concluded that the provision in Section 4, addressed solely to a 30-day notice provision, grants it *total* power to retroactively increase rates in *any* circumstance where it might conclude there to be "good cause." This bizarre attempt at statutory construction could not be defended at all by the Commission in oral argument before the court below. Attached Appendix at 11a-13a.

Such reading is not only inconsistent with the plain meaning of the statute and the rules of statutory construction, but if accepted herein would functionally overturn precedents the Commission has not challenged and now recognizes as binding.

In *Electrical District No. 1 v. FERC*, 774 F.2d 490 (D.C. Cir. 1985) ("*Electrical District*"), the D.C. Circuit, in citing to both this Court's decision in *Arkansas Louisiana* and the language of Section 206 of the Federal Power Act, 16 U.S.C. § 824e (the analog of Section 5 of the NGA), concluded that even when the Commission determined in a hearing, that the existing rates of a utility were unjust and unreasonable, the

Commission could not order the customers to pay higher "just and reasonable" rates until *after* the Commission had actually accepted new just and reasonable rates filed by the utility.

Section 205 of the Federal Power Act has the same waiver of the 30-day notice requirement upon a finding of good cause as has Section 4 of the NGA. Pursuant to the Commission's and the Petitioners' position here, the Commission had the power to turn the *Electrical District* decision into a vacuous exercise by simply finding, on remand, that inasmuch as it had found the utility's rates to be fully just and reasonable, there was clearly "good cause" for waiving the notice provision and permitting those "just and reasonable" rates to become effective prior to the filing of the new rate schedules by the utility.

We don't believe that Justice (then appeals court Judge) Scalia felt he was engaging in a vacuous exercise when he wrote the Opinion in *Electrical District*. And neither did the Tenth Circuit when, in *Public Service Company of New Mexico v. FERC*, 832 F.2d 1201, 1225 (10th Cir. 1987), it stated that it was persuaded by the reasoning of *Electrical District* and concluded that there could be no *ad hoc* facts (whether constituting good cause or otherwise) which could permit the Commission to engage in retroactive ratemaking.[9]

---

[9] Not only did the Commission not seek review of the *Electrical District* or *Public Service Company of New Mexico* decisions, but it currently follows those decisions as binding precedents on the construction of its enabling legislation. Kansas Gas & Electric Company, 34 F.E.R.C. (CCH) ¶ 61,288 at 61,517 (1986).

There are a number of statements and citations advanced by Petitioners at pages 12 through 16 to which response is appropriate. At page 14, Petitioners suggest that the Fifth Circuit's decision in *Texas Eastern* recognized that the Commission could waive the NGA's prohibition against retroactive ratemaking. This is incorrect. The *Texas Eastern* decision did not deal with the waiver provisions of Section 4 of the NGA because the decision was based not on the NGA, but Section 110 of the NGPA. The NGPA does not provide for filed rates as does the NGA, nor does it contain any express prohibition against retroactive ratemaking.

Also at page 14, the Petitioners allege that the court below's "crabbed view of the Commission's waiver powers is wholly at odds with the language of Section 4(d) which requires 'good cause,' not agreement by the parties or advance notice by the Commission." However, Petitioners' argument had already been answered by MDG in its brief to the lower court:

> At 30, the Pipelines argue that waiver is permitted upon a showing of "good cause" and that good cause is not synonymous with "customer consent." The Commission similarly argues that the NGA permits waiver for "good cause" and nowhere limits good cause to simply effecting the "contractual intent" of the parties. Commission Br. at 31. However, none of the Petitioners here have ever alleged that good cause is limited only to customer consent or contractual intent, but rather only that, consistent with the case law cited previously, a good cause waiver comes into play only where true retroactivity is *not*

> involved. Thus, the Commission can permit a rate increase to become effective on a 20-day notice, a 10-day notice, or even a zero-day notice, upon a finding of any kind of "good cause." However, if the Commission attempts to make a rate increase effective prior to the date of filing, then it must show, as noted above, either (1) it is not imposing a retroactive rate alteration but simply giving effect to the contractual intent of the parties as to the effective date of a rate or (2) the waiver does not violate the consumer protection purposes of the filed rate doctrine and rule against retroactive ratemaking.

Reply Brief of Petitioner, Municipal Defense Group at 9, n.5. The alleged "crabbed view" is the only interpretation of Section 4(d) which does not cause it to come into irreconcilable conflict with Section 5, and MDG submits, the only interpretation which is consistent with the plain meaning of Section 4 itself.

At 14, n.7, the Petitioners cite both *Hall v. FERC*, 691 F.2d 1184, 1191-1192 (5th Cir. 1982), *cert. denied*, 464 U.S. 822 (1983) and *City of Piqua v. FERC*, 610 F.2d 950 (D.C. Cir. 1979) as supportive of their argument. However, to the contrary, both of these cases concluded that the Commission could not grant waiver of Section 4 so as to permit a retroactive rate increase in violation of Section 5. Both cases state that a waiver of Section 4 (or the Federal Power Act analog, Section 205) is permissible only where there was no retroactive rate increase involved.

At 15, Petitioners attempt to contrast the situation here with the Court's recent *Maislin Industries* decision, stating:

> Here, in contrast, the issue is whether the Commission has the authority to approve a surcharge to recover deferred costs, the recovery of which is expressly authorized by statute. As noted above, these rates were all on file, and the collections were at the filed rate levels.

However, Petitioners are wrong. Nowhere does the NGA authorize, "expressly" or otherwise, a surcharge to recover past costs. These rates were not "on file", nor were the collections "at the filed rate levels" at the time the gas was being sold and consumed by consumers. And, to cite once again this Court's decision in *Arkansas Louisiana*, "the [Natural Gas] Act . . . prevents the Commission itself from imposing a rate increase for gas already sold." 453 U.S. at 578.

Also at 15, Petitioners argue: "The error of the D.C. Circuit's approach is highlighted by its concession . . . that the Commission's assessment of the equities and the public interest in this instance appeared to be sound." As discussed *supra* at 2, MDG does not read the decision below as constituting any acknowledgment of the soundness of the Commission's assessment of the equities. MDG reads the court's statement that "the Commission may well be correct in its assessment of the equities" as the court's agreement with the position of MDG that one equitable disposition of this case could be for the Commission to reopen the Order 94 series to restore the *status quo ante*. But regardless whose interpretation is correct, the legal significance of the lower court's statement is identical to that of this Court in *Maislin Industries*:

> [T]his Court has read the statute to create strict filed rate requirements and to forbid equitable defenses . . . .
>
> * * *
>
> Despite the harsh effects of the filed rate doctrine, we have consistently adhered to it.

58 U.S.L.W. at 4864, 4865.

At 16, Petitioners allege that the D.C. Circuit's later opinion in *Transwestern Pipeline Company v. FERC*, 897 F.2d 570, 578 n.5 (D.C. Cir. 1990) acknowledge that the Commission's waiver power under Section 4(d) could come into play in situations not contemplated by the court below in the instant case. However, this is a miscitation. In note 5, the *Transwestern* court did not discuss the Commission's "waiver" power under Section 4(d). The court's reference was simply to the inherent historical equity powers of courts of original jurisdiction to undo what is wrongfully done by virtue of their orders. Such power does not rest on any waiver authority, but rather on the common law.[10] Indeed, the note 5 of

---

[10] In the Federal system, this common law power has been carried over into the provisions of Fed. R. Civ. P. 60(b), 28 U.S.C. 60(b) (1990). Accordingly, it has been recognized that, notwithstanding the one-year limitation in Rule 60(b) regarding the power of the courts to reform judgments, the federal courts have the same historical authority of equity courts in general to undo their own wrongs for an indefinite period of time, subject only to the defense of latches. Goland v. CIA, 607 F.2d 339, 373 (D. C. Cir. 1978); Carr v. District of Columbia, 543 F.2d 917, 926-927 (D.C. Cir. 1976); West Virginia Oil and Gas Company, Inc. v. George E. Breece Lumber Company, 213 F.2d

the *Transwestern* decision, cited by Petitioners, explicitly concluded that this inherent equity power is totally unrelated to the Section 4(d) waiver power that was at issue before the court.

B. That The Case Below Does Not Represent An Important Question For This Court To Consider Is Underscored By The Fact That The Statutory Interpretation Of The Lower Court Is Not Unique, But Consistent With A Long Series Of Cases Preceding And Succeeding The Decision Below In Both Gas And Electric Cases Involving Both The D.C. And Other Circuits

Petitioners' Argument number 2, which commences at page 17, cites to a number of D.C. Circuit decisions issued both prior and subsequent to the decision below, which interpreted the Natural Gas Act in the same manner as the instant decision, as suggesting that this case presents an important federal question for the Court's review. However, MDG submits that consistency is a virtue, not a vice.

Petitioners' argument at 19 that the decision below "eventually will be carried over by the court to the electric power industry as well" is puzzling. The original conclusion that the Commission's attempt to retroactively bill consumers for Section 110 costs was barred by the filed rate doctrine and rule against retroactive ratemaking in *Columbia I*, was predicated on two primary precedents: (1) *Arkansas Louisiana* and (2) *Electrical District*. 831 F.2d at 1140-1141. The latter case, of course, involved the electric power

---

702, 704-706 (5th Cir. 1954).

Although this common law power could be employed by the Commission to undo the wrongs done in the Order 94 Series, it could not be employed to overcome Section 5's specific prohibition against retroactive rate increases.

industry; and, inasmuch as it preceded the decision below, it would be more realistic to allege that this particular interpretation of the filed rate doctrine and prohibition against retroactive ratemaking was "carried over" from the electric power industry to the natural gas industry.

However, that would equally misstate the issue because neither the decision below nor *Electrical District* created either the filed rate doctrine or the prohibition against retroactive ratemaking. The Congress did in enacting both Section 5 of the Natural Gas Act and Section 206 of the Federal Power Act. All the court below did is follow the plain meaning of those statutes as enacted by Congress and as consistently interpreted by this Court in *Hope Natural Gas, Montana-Dakota* and *Arkansas Louisiana*, the D.C. Circuit in *Electric District* and the Tenth Circuit in *Public Service Company of New Mexico*.

There is no inconsistency in the interpretation of these statutory provisions in any of these cases. The inconsistency that does exist is the inconsistency between the interpretation of the Petitioners and the decisions of the courts, as well as the plain language of Congress. The Petitioners' position not only cannot be reconciled with the decision of the court below, it cannot be reconciled with the decision in *Electrical District*, the decision in *Public Service Company of New Mexico*, the decision in *Arkansas Louisiana*, etc.

C. There Is No Conflict Between The Decision Below And That Of Any Other Circuit

In its argument Section 3, commencing at page 19, Petitioners allege that there is a conflict between the decision below and the decisions of the Fifth Circuit

in *Texas Eastern* and the Tenth Circuit in *Phillips Petroleum Co. v. FERC*, 902 F.2d 795 (10th Cir. 1990). However, it is clear from the face of these decisions that they are not conflicting because, *inter alia*, they aren't even interpreting the same statutes. The *Texas Eastern* and *Phillips Petroleum* decisions were addressed to Section 110 of the NGPA, while the decision below was addressed to Sections 4 and 5 of the NGA. The fact that there is no conflict is obvious when one compares the Tenth Circuit's *Phillips Petroleum* decision with the Tenth Circuit's decision in *Public Service Company of New Mexico*. The Tenth Circuit's *Public Service Company of New Mexico* decision was addressed to Section 206 of the Federal Power Act, the parallel provision of Section 5 of the Natural Gas Act.

As discussed *supra* at 15, in *Public Service Company of New Mexico*, the Tenth Circuit, following the precedent of *Electrical District* (which followed the precedent of *Arkansas Louisiana*) concluded that the Act completely prohibited any attempt to retroactively increase rates and that there were no *ad* hoc facts (good cause) which could overcome that prohibition. Thus, the Tenth Circuit's *Public Service Company of New Mexico* decision is substantively identical in legal import to the decision of the court below in the instant proceeding.

Yet, the Tenth Circuit found no conflict between its decision in *Public Service Company of New Mexico* and its decision in *Phillips Petroleum*. Thus, there is no conflict at law between the decisions, as alleged by Petitioners. The alleged "conflict" is essentially the same type of argument alleging an "inequitable" result from the interrelation of two different statutes

administered by the same agency, as was so recently rejected by this Court in *Maislin Industries*. However, such arguments cannot be transformed into a legal conflict between the Circuits, or justification for the court ignoring the plain meaning of the statute to avoid the alleged inequitable result.[11] This is essentially the finding of the court below, as it was the finding of this Court in *Maislin Industries*. And, as the Court said in *Maislin Industries*, the alleged inequitable result which stems from the two different, allegedly conflicting statutory schemes, is properly addressed to Congress, not the courts. 58 U.S.L.W. at 4867.

Even though the *Texas Eastern* decision interpreted a different statutory scheme, with neither a filed rate doctrine nor a prohibition against retroactive ratemaking, it recognized the lawfulness of the Commission's retroactive effective date for the Section 110 allowances was predicated on the purchasers having received adequate notice.[12]

At 20, Petitioners argue that adequate notice to pipeline purchasers of producer gas pursuant to the

---

[11] The allegation notwithstanding, MDG's showing that there was no inequitable result was unchallenged below. Attached Appendix at 1a-6a.

[12] Petitioners suggest that the Fifth Circuit in Texas Eastern found that the NGPA mandated retroactive application of the Section 110 costs. However, as discussed *supra* at 4, that inference is absolutely false. The Fifth Circuit concluded that, in view of the adequacy of the notice given, retroactive application was not unlawful, but the court did reverse the Commission's attempt to discriminate between different classes of Section 110 charges and required equal retroactivity for some Section 110 charges for which the Commission had previously denied retroactivity. 769 F.2d at 1065-1066.

NGPA is tantamount to adequate notice to pipeline customers under the NGA. However, as the court below in *Columbia I* found, this inference is untenable. 831 F.2d at 1141.

Pursuant to Commission rules, pipeline customers such as members of the MDG must receive specific notification by mail of any proposal to change the filed rate tariffs under which those customers take service and pursuant to which those customers pay for the service taken. 18 C.F.R. § 154.16(b) (1988).

However, in contrast, as the Court in *Columbia I* found, the notice the Commission gave in the Order 94 series was so tentative, conditioned, and restrictive, that customers like the MDG really could have no idea what potential impact such orders might have:

> Although FERC claims that "Order Nos. 94 and 94-A gave notice that the prices paid for gas during the pendency of the Commission's rulemaking were not final prices," Brief for Commission at 16, the orders were explicitly concerned with *first sales*. Furthermore, even in that context, the Commission was careful to limit the application of Order No. 94-A to those cases in which first purchasers were contractually bound to pay the deferred costs.
>
> "As a general matter, the final rules will not operate to authorize the collection of amounts for production-related costs incurred prior to today. A basic principle of administrative procedure is that rules should operate prospectively only. We see no reason to depart from this principle in implementing these amendments. To the

> contrary, there is good reason to adhere to it."

48 Fed. Reg. at 5,161. In a footnote to the above-quoted section, the Commission stated:

> "An exception is made in the case of delivery or compression services. However, this exception is based upon the Commission's notice in Order No. 94 that these costs could be recovered. In addition, this recovery is under particular safeguards to insure that amounts collected for these services may only be collected *if contractual authority existed to collect them at the time they were incurred.*"

Id. at n.89 (emphasis added); *see* 18 C.F.R. § 271.1104(c)(4)(ii). It is thus clear that the notice provided by the two orders was limited to a highly restricted audience.

Columbia I, 831 F.2d at 1141. It is also clear that the notice given in the Order 94 series not only failed to comply with the required notice under the Commission's rules, the notice was many times more obscure and less adequate than the notice found unlawfully inadequate in *Electrical District*.[13]

At 20-21, note 10, Petitioners argue:

---

[13] At 22, Petitioners cite Judge Wald's dissent from the denial of rehearing *en banc* in Associated Gas Distributors v. FERC 898 F.2d 809, 811 (D.C. Cir. 1990). While there are some similarities between the instant proceeding and *Associated Gas Distributors*, what is particularly telling about Judge Wald's dissent is the fact that she did not dissent in the instant proceeding. See Petitioner's Appendix at 15a.

> Thus, the D.C. Circuit's finding that pipeline customers had inadequate notice that they would one day be charged for production-related costs is implausible. As the Fifth Circuit remarked under similar circumstances, the courts should 'greet[ ] such assertions, made by highly sophisticated industry participants, with skepticism.' *Shell Offshore, Inc. v. FERC*, 858 F.2d 1147, 1153 (5th Cir. 1988).

MDG submits, in the circumstances of this case, there is no comparison whatsoever between the "highly sophisticated industry participants" such as Shell Offshore, etc. and respondents in this case, such as MDG.

MDG members are small municipalities whose utility departments make up just one small (and usually very small) part of a small municipal government. They rely, and rightfully so, on the Commission's rules which provide that they will be specifically notified in the event of a proposed change which would effect their gas tariffs. Moreover, they have a right to rely on that notice, not only because of the Commission's rules, but because of the very purpose of the Natural Gas Act and Federal Power Act:

> [The Act's] primary purpose [is] protecting the utility's customers. *See Town of Alexandria, Minnesota v. FPC*, 555 F.2d 1020, 1028 & n.42 (D.C. Cir. 1977). The wholesale purchasers of electricity cannot plan their activities unless they know the cost of what they are receiving, particularly if they are retailers, who must calculate their appropriate resale rates, *cf, Indiana & Michigan Electric Co. v. FPC*, 502 F.2d 336, 344 (D.C. Cir.

> 1974), *cert. denied*, 420 U.S. 946, 95 S. Ct. 1326, 43 L.Ed.2d 424 (1975), but also if they are large-scale purchaser-users. Providing the necessary predictability is the whole purpose of the well established "filed rate" doctrine, which "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577, 101 S. Ct. 2925, 2930, 69 L.Ed.2d. 856 (1981).

Electrical District, 774 F.2d 490 at 493.

The Petitioners in *Shell Offshore, Inc.* were producers. The sale of gas was their business. It was not ancillary to any other function of their organization or reason for being. The Commission rule at issue in *Shell Offshore, Inc.*, the change from the "wet rule" to the "dry rule", had an immediate and substantial direct impact on their very profitability, the reason for which businesses exist. By every standard and most particularly the purposes of the Natural Gas Act, the comparison is ludicrous.[14]

---

[14] At 21, note 11, Petitioners cite to Nantahala Power Company & Light Company v. Thornburg, 476 U.S. 953 (1986) as prohibiting the potential of "trapped costs" as the result of the opinions between *Columbia II* and *Texas Eastern*. However, that citation is wholly inapposite. The illegality in *Nantahala* was the fact that the potential trapping of costs would produce a violation of federal pre-emption. In this case, no such possibility exists. No party challenged MDG's conclusion that the Commission has inherent authority to "untrap" the costs if it chooses. Moreover, unlike the situation in *Nantahala*, the record in this case shows that the Commission's ratemaking policies fully compensated the pipelines in advance for the potential "trapped" costs.

PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, Respondent, Municipal Defense Group, respectfully requests that this Court deny certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

CHARLES F. WHEATLEY, JR.
Counsel of Record
PHILIP B. MALTER
WHEATLEY & RANQUIST
34 Defense Street
Annapolis, MD 21401
(301) 266-7524

Attorneys for The Municipal Defense Group

July 25, 1990

APPENDIX

APPENDIX
TABLE OF CONTENTS

Page

Excerpts from:

Reply Brief of Petitioner, Municipal Defense Group, No. 88-1701 ..... 1a

Initial Brief of Petitioner, Municipal Defense Group, Nos. 85-1846, *et al.* 9a

Transcript of Oral Argument, October 12, 1989, *Columbia Gas Transmission Corporation, et al. v. Federal Energy Regulatory Commission*, Nos. 88-1701, *et al.* 11a

APPENDIX

Reply Brief of Petitioner,
Municipal Defense Group, No. 88-1701

* * *

5 U.S.C. § 557(c)(3)(A) requires that the Commission issue a reasoned decision on all material issues of fact, law or discretion presented to it. Not only did the Commission patently fail to do that below, it continues to fail to address the material issues advanced by MDG or to provide reasoned responses thereto.

IV. CONCERNS OF FAIRNESS AND EQUITY ARE FULLY CONSISTENT WITH THE PROHIBITION AGAINST RETROACTIVELY CHARGING THE CONSUMERS IN THIS MATTER

As the preceding has established, what the Commission has attempted in this proceeding is clearly an unlawful retroactive rate increase. The Commission argues, however, that concerns of fairness here are "overarching." Commission Br. at 24. While it is questionable whether concerns of fairness can ever "overarch" the law, as will be shown hereinafter, in this case, concerns of fairness are completely consistent with the law.

The Natural Gas Act, 15 U.S.C. § 717 *et seq.*, was enacted "to afford consumers a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Company, supra.*[8] However,

[8] While the overall objective was to protect consumers, the Act has some provisions which are clearly biased towards the utilities. Pursuant to Section 4(e) the utility has the right to place a rate increase in effect after a suspension period of no greater than five months. However, there is no similar provision governing rate decreases. To offset this, Congress wrote into the Act the bias favoring retroactive rate reductions, but not retroactive rate increases. Belco Petroleum Corporation v. FERC, *supra.* It was fully contemplated that because of

commencing in about 1970, the Commission and, to a degree, Congress, became primarily concerned with the apparent shortage of gas and much of the consumer protection objectives of the Natural Gas Act were ignored. Wellhead prices for new natural gas rose from 19¢ per Mcf to $3.75 per Mcf. Order No. 451, III FERC Stats. and Regs., Regs. Preambles ¶ 30,701 at 30,204, 30,206 (1986). Even "old" gas, the investment in which was predicated on prices in the 20¢ per Mcf range, rose to over $1.40 per Mcf. *Id.*

Not only did the pipelines pass through all these costs, they were also made the specific beneficiaries of incentives to promote increased supplies of natural gas. Pursuant to the latitude given it in the Revenue Act of 1971, the Commission permitted pipeline companies to keep all of the benefits of investment tax credits. The Commission gave the pipelines the "short supply" benefits of the Act, which were arguably only intended to be applicable to producers inasmuch as they were designed to provide incentives for increased production of natural gas. Nonetheless, the Commission, in its no-holds barred attempts at increasing natural gas supplies, permitted natural gas pipelines to keep *all* the benefits of the investment tax credits from 1971 to 1986. *Ratemaking Treatment of Investment Tax Credit For Natural Gas Pipeline Companies*, Order 440, 33 F.E.R.C. ¶ 61,295 (1985). This constituted a specific allowance for the pipelines to recover *more* than their prudently-incurred costs.

The Commission also considerably loosened its regulation of the pipelines across the board. Whereas, pursuant

---

this bias, the pipelines might not be able to charge consumers rates that are otherwise fully just and reasonable. FPC v. Tennessee Gas Transmission Company, 371 U.S. 145, 152-153 (1962). *Electrical District, supra*; Interstate Natural Gas Assoc. of America v. FERC, 756 F.2d 166, 171 (D.C. Cir. 1985). Because of this, as *Hall* stated at 1193, "the Commission has a duty to protect the consumer even if such results in some "injustice" to [the pipelines]."

to *Atlantic Refining Company, supra*, the Commission was supposed to set rates of return at "the *lowest* possible reasonable" level, nonetheless the Commission started allowing returns at the *upper* end of the zone of reasonableness. *Tennessee Gas Pipeline Company*, Opinion No. 769, 56 F.P.C. 120, 139 (1976); *Natural Gas Pipeline Company of America*, Opinion No. 762, 55 F.P.C. 2328, 2340 (1976); *Algonquin Gas Transmission Company*, Docket No. RP73-112, 2 F.E.R.C. ¶ 63,004 at 65,029 (1976); *Tennessee Valley Municipal Gas Association v. Alabama-Tennessee Natural Gas Company*, Opinion No. 594, 45 F.P.C. 635, 642 (1971), *rev'd on other grounds*, 470 F.2d 446 (D.C. Cir. 1972).

The result of all of these policies was earned returns for the gas pipeline industry that were truly unprecedented. Even though the Commission now recognizes that gas pipeline companies are less risky than unregulated firms generally and no more risky than the electrics,[9] their earned return for the decade of the 70's exceeded those of the electrics by 475 basis points and the Standard & Poors 400, the cream of the unregulated sector of American industry, by almost 300 basis points:

Year	S & P 400	Gas Transmission	Electrics
1970	11.87%	15.75%	12.70%
1971	11.57	15.67	12.36
1972	12.23	15.54	12.67
1973	13.86	15.51	11.95
1974	14.78	14.89	10.71
1975	13.21	17.57	11.63
1976	14.35	17.28	12.03
1977	13.68	17.94	11.75

[9] Tennessee Gas Pipeline Co., Opinion No. 190, 25 F.E.R.C. ¶ 61,020 at 61-095-61-097 (1983).

1978	14.58	17.30	11.93
1979	17.04	19.37	11.63

Algonquin Gas Transmission Company, Docket No. RP80-72, Initial Decision, 17 F.E.R.C. ¶ 63,063, 65,314 (1981). When totaled up, the excess profits allowed by the Commission for the period 1970 through 1983 alone equaled over 60% of the total net worth of the entire pipeline industry.[10]

The $1.5 billion retroactive charges at issue in this case may seem like a huge sum. However, as compared to either the additional profits allowed the producers, or the excess profits granted the pipelines, it is a drop in the bucket. Clearly, most of the "complete, permanent and effective bond of protection from excess rates and charges" of *Atlantic Refining Company* has been rendered a nullity. About all that is left are the protections of the filed rate doctrine and prohibition against retroactive rate increases.

The Commission's objective in every case, pursuant to the NGA, should be the "lowest possible reasonable cost consistent with the maintenance of adequate service." *Atlantic Refining Company*, 360 U.S. at 388. The producer price rise cited *supra* was not simply mandated by the NGPA. Wherever the Commission had the discretion to

---

[10] The Commission did not permit an evidentiary hearing on remand below and, accordingly, both the Commission and the pipelines have attached considerable extra-record evidence to their briefs. The 60% plus figure can be obtained by simply summing the difference between the return earned by the gas transmission industry and that earned by the electric utility industry for the relevant years from the *Algonquin Gas Transmission Company* decision cited above, and "Statistics of Interstate Natural Gas Pipeline Companies", and "Financial Statistics of Selected Electric Utilities," Energy Information Administration. However for easy access to these calculations, we would refer the Court to the Joint Appendix, Volume 4, J.A. 718-721, currently before the Court in American Gas Association, *et al* v. Federal Energy Regulatory Commission, No. 87-1588, *et al.* The parties before the Court in this case are also parties in No. 87-1588, *et al.*

increase prices above NGPA levels, it did so and, in the case of high-priced gas, doubled that level. Order No. 99, FERC Stats. and Regs., ¶ 30,183 (1980).[11] Similarly, there was nothing in the Commission's enabling legislation which could countenance the excess profits it permitted the pipelines to earn.

The net results of these policies were gas prices that were simply too high for the market to bear. Unregulated market prices currently range between $1.05 and $1.65 per Mcf. *See* Addendum. The difference between the current market price of gas and the unnecessarily high prices set by the Commission has primarily produced the take-or-pay crises which is being litigated before this Court in Docket No. 87-1588.

At 29 of its brief, the Commission alleges that its current policy is to "give consumers the benefit of a competitive wellhead market." Yet, the impact of the orders on appeal is to retroactively increase prices to producers to a level above the previously excessive high levels that themselves were far above the current competitive wellhead market.

Even the Commission's allegations of fairness arise entirely from its own strawman argument. At 24, the Commission alleges that inasmuch as it thought the notice it gave in Order 94 was legally sufficient, it therefore "precluded" the pipelines from collecting Section 110 costs prior to its determination of those costs. Similarly, the Pipelines argue that these costs are not retroactive because the producers would have recovered the costs currently, had it not been for the FERC's recovery "moratorium." Joint Br. at 33. In a similar vein, the Commission states that the Section 110 costs at issue here were "authorized" by Congress. Commission Br. at 4.

---

[11] In Order No. 451, *supra*, the Commission has continued to increase producer prices, this time by eliminating vintaging from old gas contracts.

However, the truth of the matter is that the costs allowed, as well as their retroactive collection, were "rights" created by the Commission, not Congress. When an earlier Commission addressed the issue of Section 110 costs, it stated: "[t]he statute does not require the Commission to automatically permit the recovery of all such costs, but leaves to the discretion of the Commission whether to grant the authority to Sellers to recover such costs." FERC Stats. and Regs., ¶ 30,026 at 30,184 (1978).

Moreover, nowhere in the NGPA is there the right of the producers to collect interim Section 110 costs prior to the final determination by the Commission.[12] Accordingly, there are no equities flowing from the Commission's "moratorium." If, instead of just expressing the concerns about fairness, it had acted on those concerns, the $1.5 billion of retroactive charges at issue here would never have existed.[13]

---

[12] Inasmuch as the NGPA does provide for interim collection of other costs prior to the final Commission determination, 15 U.S.C. § 3413(e), pursuant to the doctrine of *expressio unius est exclusio alterius*, interim collection of Section 110 costs was, therefore, not intended. Only producers selling old gas dedicated to interstate commerce prior to November 8, 1978 had rights pursuant to Section 4 of the NGA to file for and to collect Section 110 prices, prior to Commission determination thereof. However, the earlier Commission recognized that it did not have to accept a filing for these Section 110 costs, inasmuch as it was under no obligation to permit any Section 110 costs for old costs. FERC Stat. and Regs., ¶ 30,026 at 30,180 (1978).

[13] The Commission now realizes that it was operating under a mistake of law in Orders 94 and 94-A. Commission Br. at 24. No party has challenged MDG's position that, in these circumstances, the Commission could reconsider those orders and deny the producers the right to retroactively bill the Pipelines. *See* citations in MDG Initial Br. at 16 n.11. *See also*, FPC v. Sunray DX Oil Company, 391 U.S. 9, 43 (1968); Tennessee Valley Municipal Gas Association v. FPC, 470 F.2d 446, 452-453 (D.C. Cir. 1972).

V. WHILE SECTION 601 OF THE NGPA LIMITS THE COMMISSION'S DISCRETION, IT GRANTS THE COMMISSION NO POWER TO PERMIT RETROACTIVE RATE INCREASES

The Pipelines and the Commission allege that flow-through of these retroactive charges is required by the "guaranteed passthrough" provision of the NGPA, § 601, 15 U.S.C. § 3431. Section 601 deems NGPA prices to be "just and reasonable" for the purposes of Sections 4 and 5 of the NGA, and restricts the Commission's power and discretion to "deny" Pipelines recovery of the NGPA "just and reasonable" amounts paid. However, as noted *supra*, in *Arkansas Louisiana* the Supreme Court found that, pursuant to the NGA, neither the Commission nor the courts had *any* power to grant or "deny" retroactive rate increases.

While the NGPA restricted some of the Commission's discretion under the NGA, there is nothing in the NGPA which expands the Commission's NGA powers to permit it to violate the filed rate doctrine or the ban against retroactive ratemaking. The fact that Section 601 of the NGPA deems these rates to be "just and reasonable" for the purposes of Sections 4 and 5 of the NGA does not permit a retroactive increase. As already noted, the filed rate doctrine and rule against retroactive ratemaking bar "the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate.[14]

---

[14] Even in Texas Eastern Transmission Corp. v. FERC, 769 F.2d 1053, 1068-1069 (5th Cir. 1985), it was recognized that the NGPA did not modify the pre-existing ratemaking principles to guarantee the pipelines the right to recover from consumers all gas costs subject to NGPA pricing. The court ruled that, consistent with the Commission's past consumer protection principles, the pipelines could only passthrough to consumers the NGPA maximum lawful price, not the cost of transporting the producers' own liquids. If the contract between the pipeline and producer provided that the pipeline would provide that service to the producer, the pipeline, *not* the consumer, would have to bear the

At page 22 of the Commission's brief, they argue that all consumers were put on notice that Section 601 of the NGPA would guarantee the pass through of these retroactive costs because of the following language contained in Order No. 94:

> [t]his Rule . . . establishes a policy . . . [that] provides that certain types of production-related costs incurred by an interstate pipeline purchaser *will be deemed prudently incurred in proceedings brought under the Natural Gas Act.*

Commission Br. at 22.

The Commission is wrong. Pursuant to the Natural Gas Act, the pipelines are specifically prohibited from retroactively collecting costs from consumers, regardless whether they are prudently incurred or not. However, the Commission has put the issue in correct prospective, *i.e.*, the NGPA's guaranteed passthrough provision is essentially the same as the Commission's previous guarantee that Pipelines be permitted to pass through their cost of purchased gas to the extent prudently incurred. The two concepts are analogous and both are controlled by the NGA's denial to both the courts and the Commission the power to retroactively increase rates to consumers above those on file with the Commission.

---

costs associated therewith.

The Commission similarly ruled in El Paso Natural Gas Company, 42 F.E.R.C. ¶ 61,024 at 61,148 (1988):

> Although the NGPA limits the Commission's ability to deny the passthrough of certain statutorily defined "just and reasonable" purchased gas costs (unless the Commission finds that the amounts were excessive due to fraud, abuse, or similar grounds) a pipeline's recovery of purchased gas costs is not guaranteed by the statute. . .

Initial Brief of Petitioner,
Municipal Defense Group Nos. 85-1846, *et al.*

* * *

The Commission has also alleged that these retroactive charges are required by the "passthrough" provision of the NGPA, Section 601, 15 U.S.C. § 3431. The Commission is wrong here too. Section 601 simply deems NGPA prices to be "just and reasonable" for the purpose of Sections 4 and 5 of the NGA, and restricts the Commission's power to deny pipeline recovery of the NGPA "just and reasonable" amounts paid.

However, as noted *supra* in *Arkansas Louisiana*, the Supreme Court found that neither the Commission nor the courts had *any* power to deny or grant retroactive rate charge pursuant to the NGA, and:

> the Act bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and prevents the Commission itself from imposing a rate increase for gas supply sold.

453 U.S. at 578. While the NGPA restricted some of the Commission's authority under the NGA, there is nothing in the NGPA which expands Commission NGA powers to permit it to violate the filed rate doctrine or the ban against retroactive ratemaking.

The fact that Section 601 of NGPA deems these rates to be "just and reasonable" for the purposes of Sections 4 and 5 of the NGA is irrelevant. The filed rate doctrine and rule against retroactivity bar "the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate." *Arkansas Louisiana, supra*, 453 U.S. at 378, citing *City of Piqua v. FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979); *see also, Electric District, supra*, 774 F.2d at 442.

Even in *Texas Eastern* it was recognized that the NGPA did not modify pre-existing ratemaking principles to guarantee the pipelines the right to recover all NGPA costs from consumers. The court ruled that, consistent with the Commission's past consumer protection principles, the pipelines could only pass-through to consumers the NGPA maximum lawful price, not the cost of transporting the producers' own liquids. If the contract between the pipeline and producer provided that the pipeline would provide that service to the producer, the pipeline, *not* the consumer, would have to bear the costs associated therewith. Id., 764 F.2d at 1068-1069.

CONCLUSION

WHEREFORE, for the foregoing reasons, the MDG respectfully requests that the Court reverse the rulings of the Commission below and require the Commission to order refunds of all retroactive "Order 94" charges which the Commission previously allowed Panhandle Eastern Pipeline Company to charge the MDG.

Transcript of Oral Argument, October 12, 1989, *Columbia Gas Transmission Corporation, et al. v. Federal Energy Regulatory Commission*, Nos. 88-1701, *et al.*

* * *

ORAL ARGUMENT OF JILL HALL, ESQ.,
ON BEHALF OF RESPONDENT

[18] MS. HALL: May it please the Court—

QUESTION: Ms. Hall, how do you get around Mr. Malter's laying out of authority for the proposition that the Commission is without the power to impose retroactive costs?

MS. HALL: Your Honor, when you look at all the past cases that have come down from this, you have got to go first to the statute and the statute says that the Commission, for good cause shown, may allow waiver of the section 4(d) notice requirement.

QUESTION: Waiver of a 30-day period, that means, instead of having this price increase go into effect tomorrow, it goes into effect today. It says nothing about yesterday.

MS. HALL: Well, Your Honor, the cases have interpreted this as allowing for past that period. In *Hall v. FERC*, it was a 20-year period where the producers in *Hall* were allowed to go back and collect these prices. The Commission submits today—

QUESTION: That was to allow two parties to implement their agreement as to when price increases would start. This is—

[19] MS. HALL: Nevertheless, Your Honor—

QUESTION: But is this an imposition by the Commission of a retroactive increase?

MS. HALL: Excuse me, is it an—

QUESTION: An imposition, the Supreme Court says it cannot impose. To acknowledge and sanctify a private agreement is not an imposition, is it?

MS. HALL: Your Honor, in all of these cases, the Commission allowed, when a waiver was submitted, the substitution of another rate for rate previously on file. So, when you look at the genre of these cases coming down, yes, the Commission admits today that there was customer consent in all the other cases. Here there was no way to have customer consent in these cases. You are not going to get these people to agree to costs, retroactive imposition of costs. The Commission recognized and the Commission looked at the statute, the plain language of the statute, and it says the Commission, for good cause shown, may allow changes to take effect, and when the Commission looked at that wording—

QUESTION: They allow a time period to be waived.

MS. HALL: It may allow the time period to be waived, and in—

QUESTION: But does the waiver or the power to waive a 30-day time period necessarily imply the power to act retroactively to impose a rate?

[20] MS. HALL: The Commission submits that it does, Your Honor. The Commission submits that it does, and in the circumstance—

QUESTION: Is that the only source you assert for the power to impose rates retroactively?

MS. HALL: The Commission asserts that the waiver in the section 4(d) requirement allows you to do this, but only for good cause shown.

QUESTION: Is that the only source you assert for the power to impose rates retroactively?

MS. HALL: Well, the Commission would contend, Your Honor, that semantics, aside from all the other cases, you

were imposing a retroactive rate increase. You could hinge it on customer consent and you could say it was prospective when customer consent, because you had something to hang it on.

In all these cases, there were equities that compelled the Commission to waive the notice requirements in those cases, and—

QUESTION: So, any time the Commission finds that there are equities that it interprets to constitute good cause, it may do anything it wants retroactively?

MS. HALL: I think that is hardly the position that the Commission is taking here today. The Commission is—

* * *

Nos. 89-1988, *et al.* and 89-2001, *et al.*

Supreme Court, U.S.
FILED
AUG 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THE BERKSHIRE GAS CO., *et al.*,
Petitioners,

v.

ASSOCIATED GAS DISTRIBUTORS,
Respondent.

PANHANDLE EASTERN PIPE LINE CO., *et al.*,
Petitioners,

v.

COLUMBIA GAS TRANSMISSION CORP.,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF RESPONDENTS THE PROCESS GAS CONSUMERS GROUP, THE AMERICAN IRON AND STEEL INSTITUTE, AND THE GEORGIA INDUSTRIAL GROUP IN OPPOSITION

EDWARD J. GRENIER, JR.
(Counsel of Record)
WILLIAM H. PENNIMAN
GLEN S. HOWARD
STERLING H. SMITH

SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2404
(202) 383-0100

Attorneys for Respondents The Process Gas Consumers Group, The American Iron and Steel Institute, and The Georgia Industrial Group

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
STATEMENT	1
REASONS FOR DENYING THE WRIT	2
I. THE D.C. CIRCUIT CORRECTLY APPLIED WELL SETTLED STATUTORY AND DECISIONAL LAW THAT PUBLIC RATE PREDICTABILITY LIES AT THE HEART OF THE NATURAL GAS ACT'S CONSUMER PROTECTION PURPOSES	4
II. FERC'S DEFICIENCY-BASED METHODOLOGY IS NOT MERELY AN EXERCISE IN COST ALLOCATION	10
III. FERC'S AUTHORITY IN SECTION 4 TO WAIVE NOTICE DOES NOT GIVE IT AUTHORITY TO CHANGE RATES RETROACTIVELY	11
CONCLUSION	12

TABLE OF AUTHORITIES

Cases: Page

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 4, 10

Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) 7

Atlantic Refining Co. v. Public Service Comm'n of New York, 360 U.S. 378 (1959) 4

City of Girard, Kansas v. FERC, 790 F.2d 919 (D.C. Cir. 1986) 12

Columbia Gas Transmission Corp. v. FERC, 831 F.2d 1135 (D.C. Cir. 1987) 7

Electrical Dist. No. 1 v. FERC, 774 F.2d 490 (D.C. Cir. 1985) 12

FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944) 4, 5

FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956) 4, 12

FPC v. Tennessee Gas Transmission Co., 371 U.S. 145 (1962) 4

Maislin Industries, U.S. v. Primary Steel, Inc., 495 U.S. ——, 110 S.Ct. 2759 (1990) 3, 11

Statutes:

Natural Gas Act, § 4, 15 U.S.C. § 717c (1988) 3

Natural Gas Act, § 4(c), 15 U.S.C. § 717c(c) (1988) 5

Natural Gas Act, § 4(d), 15 U.S.C. § 717c(d) (1988) 5

Natural Gas Act, § 5, 15 U.S.C. § 717d (1988) 3

Administrative authorities and regulations:

Arkansas Louisiana Gas Co. v. Hall, 13 FERC ¶ 61,100 (1980) (*rev'd sub nom Hall v. FERC*, 691 F.2d 1184 (5th Cir. 1982) *cert. denied*, 464 U.S. 822 (1983) 4

North Penn Gas Co., 48 FERC ¶ 61,196 (1989) 10

Northwest Pipeline Corp., 52 FERC ¶ 61,053 (July 18, 1990) 7

TABLE OF AUTHORITIES—Continued

Page

Order 436, FERC Statutes and Regulations [1982-1985] ¶ 30,665 (1985), *vacated on other grounds, Associated Gas Distributors v. FERC*, 824 F.2d 981, (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) 7

Order 500-H, FERC Statutes and Regulations III, ¶ 30,867 (1989), *aff'd American Gas Association v. FERC*, —— F.2d —— (August 24, 1990) 10

Tennessee Gas Pipeline Co., 42 FERC ¶ 61,175 (1988) 10

Transcontinental Gas Pipe Line Corp., 46 FERC ¶ 61,343 (1989) 8

Trunkline Gas Co., 45 FERC ¶ 61,429 (1988), *appeal docketed sub nom. Michigan Consolidated Gas Co. v. FERC*, No. 88-1904 (D.C. Cir. Dec. 23, 1988) 8

United Gas Pipe Line Co., 47 FERC ¶ 61,163 (1989) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

Nos. 89-1988, *et al.*

THE BERKSHIRE GAS CO., *et al.*,
Petitioners,

v.

ASSOCIATED GAS DISTRIBUTORS,
Respondent.

No. 89-2001, *et al.*

PANHANDLE EASTERN PIPE LINE CO., *et al.*,
Petitioners,

v.

COLUMBIA GAS TRANSMISSION CORP.,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF RESPONDENTS THE PROCESS GAS CONSUMERS GROUP, THE AMERICAN IRON AND STEEL INSTITUTE, AND THE GEORGIA INDUSTRIAL GROUP IN OPPOSITION

STATEMENT

Respondents the Process Gas Consumers Group, the American Iron and Steel Institute, and the Georgia Industrial Group respectfully request that this Court deny the Petitions for Writs of Certiorari sought herein to review the judgments and opinions of the United States

Court of Appeals for the District of Columbia Circuit in *Associated Gas Distributors v. FERC*, 893 F.2d 349 (D.C. Cir. 1989), *reh'g denied en banc*, 898 F.2d 809 (1990) ("AGD"), and *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791 (D.C. Cir. 1989) ("*Columbia*").

Both cases involve the use of direct billing mechanisms keyed to customers' past purchases of natural gas. The court of appeals correctly found that these mechanisms violate the statutory prohibitions known collectively as the filed rate doctrine and the rule against retroactive ratemaking.

We join in the August 31, 1990 Briefs of Respondents in Opposition in both cases and, for the sake of brevity, adopt the Questions Presented and the Statements contained therein.

REASONS FOR DENYING THE WRIT

During the past few years, this Court has seen a spate of certiorari petitions arising out of decisions involving the Federal Energy Regulatory Commission's ("FERC") regulation of the natural gas industry. Due to the extraordinary diversity of interests among the myriad parties interested in natural gas matters (and the large amounts of money typically involved), it is perhaps not surprising that frequently, in cases having industrywide effect, *some*one (including FERC itself) will feel strongly enough about an issue to seek review by this Court. Yet, as passionate as a petitioner in any such case may feel about "its issue," few such issues actually rise to certiorari standards.

High passions notwithstanding, the instant FERC cases too fail to warrant certiorari. In fact, they present two examples of a classic, but entirely ordinary, administrative situation: an agency **earnestly** wished to achieve certain policy goals, but it sought to do so through means clearly outside its statutory authority. On review, the court of appeals twice applied well-settled law that, no matter how

well-intentioned the agency's objectives might be, it lacked authority to increase rates *after the fact* for gas already sold. To do so, the D.C. Circuit held, was in clear violation of Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. §§ 717c, 717d (1988) (the "Act"). Thus rejecting FERC's verbal somersaults purporting to show the prospective allocation of the gas costs involved, the court of appeals correctly concluded that FERC's orders in fact *raise rates for past purchases and do not merely use historic purchase data as a basis for setting prospective rates.*

The decisions below are neither novel nor expansive (*contra* FERC 89-1988 Pet. at 27); rather, they are supported by numerous decisions of this Court applying the filed rate doctrine and its companion rule against retroactive ratemaking. Allowing the D.C. Circuit's decisions to stand will not have the dire consequences FERC and other Petitioners suggest; rather as in most cases, alternative administrative remedies—that *are within* FERC's legal authority—*do* exist and may be pursued on remand.

Finally, the petitions' extended discussion and repeated emphasis of the policy rationale underlying FERC's orders seem to reflect the same common regulatory error recognized by the D.C. Circuit: the agency confuses (a) that which it believes it *should* do as a matter of policy with (b) that which it actually *can* do as a matter of law. Where the former conflicts with the latter, the latter must control; it is up to the Congress—not the agency nor the courts—to remedy the matter. *See generally Maislin Industries U.S. v. Primary Steel, Inc.*, 495 U.S. ——, 110 S.Ct. 2579, 2770 (1990).

Accordingly, the decisions below do not warrant the exercise of certiorari jurisdiction.

I. THE D.C. CIRCUIT CORRECTLY APPLIED WELL SETTLED STATUTORY AND DECISIONAL LAW THAT PUBLIC RATE PREDICTABILITY LIES AT THE HEART OF THE NATURAL GAS ACT'S CONSUMER PROTECTION PURPOSES.

This Court has long recognized that the Natural Gas Act was designed to "protect the consumer interests against exploitation at the hands of private natural gas companies," *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 612 (1944), affording "a complete, permanent and effective bond of protection from excessive rates and charges." *Atlantic Refining Co. v. Public Service Comm'n of New York*, 360 U.S. 378, 388 (1959). It is likewise well settled both that a regulated natural gas company's charges for jurisdictional service are governed solely by its filed rates and that "the Commission itself has no power to alter a rate retroactively." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981); *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 152-153 (1962); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956). The decisions below are wholly consistent with both this Court's interpretation of the Act generally and its rulings on the filed rate doctrine specifically.

There is nothing "novel and expansive" (FERC 89-1988 Pet. at 27) about the D.C. Circuit's view that the filed rate doctrine is intended to protect consumers by insuring rate predictability.[1] Indeed, the filed rate doctrine is the direct product of Sections 4(c) and 4(d) of the

---

[1] Despite its claims here, FERC has itself properly observed elsewhere that one of the "policy bases" of the filed rate doctrine is "the need for certainty as to the rates and other terms governing a regulated transaction." *Arkansas Louisiana Gas Co. v. Hall*, 13 FERC ¶ 61,100 at 61,212 (1980), *rev'd sub nom. Hall v. FERC*, 691 F.2d 1184 (5th Cir. 1982) (reversed for abuse of discretion in denying waiver of notice under Section 4(d) of the Act to give effect to contractually authorized rates), *cert. denied*, 464 U.S. 822 (1983).

Act, *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. at 576-77, and rate predictability for the public lies at the heart of those provisions. Section 4(c) requires "public" posting of all rates and charges for any service subject to FERC's jurisdiction. 15 U.S.C. § 717c(c). Section 4(d) requires 30 days' notice to FERC "and to the public" of any rate changes and requires companies to state "plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect." 15 U.S.C. § 717c(d). Advance public notice of changes in filed rates is both pointless and worthless unless consumers can rely on those published rates and make their purchasing decisions accordingly.

In the face of these consumer protection purposes, FERC suggests implausibly that Section 4 is instead intended to serve primarily the purpose of making **the agency itself** aware of rate increases and preserving its primary jurisdiction. It does not, however, require plenary Supreme Court review to confirm that FERC's suggestion ignores both the express language of the Act and the consumer interests it was "plainly designed" to protect. *FPC v. Hope Natural Gas Co.*, 320 U.S. at 612.

Congress quite deliberately balanced the interests of consumers and regulated pipelines in Sections 4 and 5 of the Act. Section 4 protects consumers from retroactive increases in filed rates; at the same time, Section 5 protects pipelines from having to make retroactive refunds when previously approved rates are found to be no longer just and reasonable. The decisions below correctly maintain this balance and reject FERC's strained view of Section 4, which would have allowed pipelines to increase their rates retroactively for gas their customers have *already* bought. *See AGD*, 898 F.2d at 810 (Williams, J. concurring).

Predictability of filed rates is an essential component of the Act's consumer protection objectives. As in any consumer decision, consumers' gas purchase decisions are

based in part on the rate they face, *i.e.*, how much their utility bill will be. This is especially so for price-sensitive industrial and large commercial consumers, who typically make their energy purchase decisions based on the cost of a *variety* of competing sources, including gas from numerous non-utility suppliers, oil, propane, and other fuels. Price differentials of as little as a penny influence these consumers' choices among potential suppliers.[2] If a consumer cannot rely on the continued effectiveness of the currently filed rates—*i.e.*, if he is exposed to *post hoc* increases in the rates charged for gas he has *already* purchased—then rational purchasing and business planning become impossible. Pipelines' filed rates not only determine the consumer's choice of suppliers and transportation routes, but also affect both (1) the prices offered by other energy sellers and (2) the discounts offered by competing gas pipelines and local utilities trying to market their sales and transportation services. Though FERC seems to scoff at the need for rate certainty with respect to gas already purchased (*e.g.*, FERC 89-1988 Pet. at 24), such certainty is fundamental to rational economic decisionmaking. By opening the Pandora's box of retroactive ratemaking here, FERC has encouraged rate gamesmanship among pipelines and has substituted commercial chaos for the rate predictability inherent in the Act's public tariff filing requirements.

The Acting Solicitor General's assertion that it is "unrealistic" to assume that clear purchasing choices always exist (FERC 89-1988 Pet. at 24) is belied by FERC's own clear policy specifically to maximize and encourage such choices. Indeed, in its Order 436, FERC termed open access transportation—which allows consumers the freedom to choose their suppliers and make their own purchasing decisions—the "cornerstone" of its

---

[2] Similarly, pipelines' wholsesale customers—typically local gas utilities—make monthly (and sometimes daily) decisions about their own purchases, since gas is often available from a number of different suppliers at varying prices.

program.[3] To provide consumers with clear purchasing choices is one of FERC's acknowledged policy objectives.[4] For the agency now to allow counsel to suggest to this Court that these objectives are "unrealistic" is to engage in self-fulfilling prophecy: that is, by seeking to erode the filed rate doctrine, FERC may well undermine its own most important policies and defeat the rate certainty so essential to market choice.

Key to the decisions below was the D.C. Circuit's recognition that, notwithstanding FERC's tortured arguments to the contrary, the rate changes approved in FERC's orders were indeed retroactive in application and effect:

> As in *Columbia Gas*, "the effect of [these orders] is quite clear: downstream purchasers [such as petitioners here] are expected to pay a surcharge, over and above the rates on file at the time of sale, *for gas they had already purchased.*"

AGD, 893 F.2d at 355-56 (emphasis added), quoting *Columbia Gas Transmission Corp. v. FERC*, 831 F.2d 1135, 1140, (D.C. Cir. 1987).

FERC's petition in *AGD* still steadfastly maintains that that it did not retroactively substitute higher rates

---

[3] Order 436, FERC Statutes and Regulations [1982-1985] ¶ 30,665 at 31,494 (1985), *vacated on other grounds, Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988). *See also Associated Gas Distributors v. FERC*, 824 F.2d at 994-96.

[4] "[O]ur current policy is to encourage access between willing buyers and sellers of natural gas in an atmosphere of fair competition. The goal of this policy is to provide incentives and opportunities that allow all shippers, industrial end users as well as LDCs and other parties, to benefit by access to commodity and transportation markets . . . . The policy . . . promotes market participation by larger numbers of players, thus providing new supply options and leverage to parties seeking efficiently priced services." *Northwest Pipeline Corp.*, 52 FERC ¶ 61,053 (July 18, 1990), slip op. at 8 (footnotes omitted).

for the ones previously on file, that it merely allocated "current" costs among customers "on the basis of" the amounts of gas they did not purchase during a past period. (FERC 89-1988 Pet. at 22).[5] But, despite this semantic legerdemain, it is clear that the rates imposed in *AGD* are indeed retroactive in the common, ordinary sense that Congress no doubt envisioned. Customers who purchased gas from Tennessee Gas Pipeline Company ("Tennessee") at publicly filed tariff rates during the 1983-1986 "deficiency period" are now required to pay substantially more for *that* gas; the higher rates are decidedly *not* for the gas they currently purchase. These customers have no means whatsoever to avoid these *post hoc* charges based on any purchasing decision they can make now. As the D.C. Circuit explained, this is "virtually indistinguishable from the Commission substituting in 1988 a new rate schedule for gas purchased in 1983-1986." *See AGD*, 898 F.2d at 810 (Williams, J., concurring).

Nowhere is this more clear than in the case of customers who no longer buy any gas from the pipeline. Under the retroactive rate surcharge method approved in FERC's orders below, even pipeline customers with expired contracts are held accountable for added payments long after they have ceased purchasing any gas—and even after FERC has approved abandonment.[6]

---

[5] Because the resulting rates were filed in public tariffs, FERC and its supporters argue that the agency satisfied the literal requirements of Sections 4 and 5 of the Act. Yet, in that limited sense, *any* new charge must obviously be billed and collected "prospectively"—the laws of time and physics preclude literal retroactivity.

Thus, if petitioners' argument were due any weight, it would simply eliminate all filed rate protection from the statute.

[6] *See, e.g., United Gas Pipe Line Co.*, 47 FERC ¶ 61,163 (1989); *Transcontinental Gas Pipe Line Corp.*, 46 FERC ¶ 61,343 (1989); *Trunkline Gas Co.*, 45 FERC ¶ 61,429 at 62,361-62 (1988), *appeal docketed sub nom. Michigan Consolidated Gas Co. v. FERC*, No. 88-1904 (D.C. Cir., Dec. 23, 1988). In *United*, FERC imposed the

The most dramatic examples of the real, not theoretical, retroactivity of these assessments—and the mischief that FERC could cause if its interpretation of the statute were upheld—occur on pipelines other than Tennessee that also use the purchase deficiency methodology to pass through costs to their customers.[7] For example, application of that methodology on the South Georgia Natural Gas Company system imposes costs on customers far in excess of any "current" measure of the cost of natural gas service. One such customer, the City of Andersonville, Georgia, is a town of 300 inhabitants with 83 retail gas customers. It was to be assessed $1.7 million in take-or-pay costs for gas not purchased during the "deficiency" period due to the town's loss of a major industrial gas purchaser to alternative fuels. This amounted to a staggering potential charge of over $20,000 per customer in a locality where the average annual income is less than $10,000. Based on the town's annual consumption at the time the charge was to have been imposed, the resulting surcharge would be over $480 per Mcf of gas purchased.[8] Even if FERC ultimately chooses to grant the town's long-pending request for hardship relief, it is ludicrous for the agency to pretend that these new charges are for "current" gas service.[9] They are

---

added costs by taking the extraordinary step of amending an earlier order which had granted abandonment of service to the customer.

[7] The comparision to other pipelines is legitimate, since it was the purchase deficiency allocation *methodology* itself that the D.C. Circuit found to violate the filed rate doctrine, not simply Tennessee's own particular implementation of it. 893 F.2d at 362. Even FERC acknowledges the impact of the court's decision on cases involving other pipelines, as well as on its generic Order Nos. 500-H and 500-I. (FERC 89-1988 Pet. at 17-18).

[8] *See* Affidavit of Mr. Jerry Hargrove, City Clerk of the City of Andersonville, Georgia filed on July 20, 1989, in *South Georgia Natural Gas Co.*, FERC Docket No. RP88-267-008, *et al.*

[9] Abandonments and other changes in pipeline markets also illustrate how these charges are indeed retroactive in any recognizable sense. For example, two of Tennessee's customers, Colum-

clearly a *post hoc* retroactive surcharge on gas previously purchased and long since consumed.

II. FERC'S DEFICIENCY-BASED METHODOLOGY IS NOT MERELY AN EXERCISE IN COST ALLOCATION.

Also unworthy of the Court's attention is FERC's argument that the issue here is simply one of cost allocation—*i.e.*, a matter of FERC determining just and reasonable rates consistent with the "broader regulatory principle" of matching rates with responsibility for the underlying costs. (FERC 89-1988 Pet. at 23). Neither in *AGD* nor elsewhere has FERC demonstrated any relationship between a customer's **past** purchases and the costs at issue, **one-half** of which costs are attributable in Tennessee's case to relief from **future** contract obligations and take-or-pay charges. Order 500-H, FERC Statutes and Regulations III, ¶ 30,867 at 31,522 (1989), *aff'd, American Gas Association v. FERC*, —— F.2d —— (August 24, 1990). But, even if there were such a connection, the Act contains no exemption to the requirements of Sections 4 and 5. FERC is not permitted to pursue regulatory principles through means which are at war with statutory principles; it cannot lawfully attempt to match cost responsibility through retroactive rates. Stated differently, the latitude traditionally allowed FERC in cost allocation matters is not so wide as to encompass its approval of illegal rates, *i.e.*, retroactive rates which it has no authority to implement.[10]

---

bia Gas Transmission Corporation and Inland Gas Company, were ordered to make payments based on contractual purchase levels formally abandoned months before the pipeline filed to recover these costs and two years before FERC issued its order approving the charges. *Tennessee Gas Pipeline Co.*, 42 FERC ¶ 61,175 at 61,634 (1988). Corning Natural Gas Corporation was assessed charges attributable to its expired contract with its pipeline, even after it had left that pipeline system. *See North Penn Gas Co.*, 48 FERC ¶ 61,196 (1989).

[10] Moreover, attaching a "cost allocation" label to this issue would not be dispositive. *See generally Arkansas Louisiana Gas*

In *Maislin Industries, U.S. v. Primary Steel, Inc.*, 495 U.S. ——, 110 S.Ct. 2759 (1990), this Court rejected a similar attempt by the Interstate Commerce Commission to override the filed rate doctrine by labelling a carrier's conduct a violation of the statutory ban against unreasonable practices. "Stripped of its semantic cover [the Commission's policy and interpretation] thus stand revealed as flatly inconsistent with the statutory scheme as a whole." Slip op. at 13. Similarly, the court of appeals here correctly rejected FERC's efforts to bootstrap its authority to set just and reasonable rates into a license to disregard the filed rate doctrine and set illegal rates.

III. FERC'S AUTHORITY IN SECTION 4 TO WAIVE NOTICE DOES NOT GIVE IT AUTHORITY TO CHANGE RATES RETROACTIVELY.

Petitioners concede the retroactive effect of the rates in *Columbia*, but they read the Act to permit pipelines nevertheless to impose such rates so long as FERC waives the statutory notice period. This reading transmogrifies Section 4's specific permission to shorten the 30-day advance notice into broad authority to increase rates for gas sold many years in the past—*i.e.*, it simply negates the filed rate doctrine. But it is impossible to conceive how Congress could have intended to give pipelines greater power to impose retroactive rates (upon a general showing of "good cause" under Section 4) than it granted FERC itself under Section 5 (to change rates only on a prospective basis and only after a specific finding that rates are unjust and unreasonable).

The Acting Solicitor General's suggestion that FERC's current view of its Section 4 waiver power dates from the late 1930s (FERC 89-2001 Pet. at 14-15 n. 10) is misleading and irrelevant. Whatever FERC's 1939

Co. v. Hall, 453 U.S. at 579, where the retroactivity of the rate increase could not be disregarded simply because it was characterized as an award of damages by the Louisiana Supreme Court.

regulation may have meant, there is no indication that FERC ever used it to impose retroactive rates without the express agreement of the parties involved. It has apparently never been tested by any court. More significantly, FERC itself has only very recently interpreted the statute to give it the authority the Acting Solicitor General now claims has long been evidenced by its regulations. In fact, as recently as 1986, in *City of Girard, Kansas v. FERC*, 790 F.2d 919, 923 (D.C. Cir. 1986), FERC argued that it had "no power" under the governing statute to order an effective date prior to the filing date of the rate change.[11]

CONCLUSION

It would be fundamentally inconsistent with the underlying purpose of regulation under the Natural Gas Act—*i.e.*, to insure that pipeline monopolies function like competitive markets to the extent feasible—to permit after-the-fact adjustment of posted prices. In no competitive market do merchants have the right to increase the price for goods sold after the customer has left the store. When a customer buys a shirt at the ticketed price, the store cannot later collect more from that customer on grounds that it discovered additional, unrecovered costs.[12]

---

[11] Although *City of Girard* was decided under the Federal Power Act, that statute is "in all material respects substantially identical" to the Natural Gas Act. *FPC v. Sierra Pacific Power Co.*, 350 U.S. at 353. *See also Electrical Dist. No. 1 v. FERC*, 774 F.2d 490, 493 (D.C. Cir. 1985), in which FERC made no effort to claim that the provisions of the regulations cited here authorize it to permit rates to become effective before the date they were filed.

[12] "The wholesale purchasers . . . cannot plan their activities unless they know the cost of what they are receiving, particularly if they are retailers, who must calculate their appropriate resale rates, . . . but also if they are large-scale purchaser-users. Providing the necessary predictability is the whole purpose of the well established 'filed rate' doctrine . . . ." *Electrical Dist. No. 1 v. FERC*, 774 F.2d 490, 493 (D.C. Cir. 1985) (citations omitted).

The D.C. Circuit properly restrained FERC's abuse of its Natural Gas Act power—which is limited to setting rates only for services to be purchased subsequently. Its decisions are consistent with the language and intent of the Natural Gas Act and with this Court's prior decisions.

For the foregoing reasons, the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

EDWARD J. GRENIER, JR.
(Counsel of Record)
WILLIAM H. PENNIMAN
GLEN S. HOWARD
STERLING H. SMITH
SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2404
(202) 383-0100
Attorneys for Respondents The Process Gas Consumers Group, The American Iron and Steel Institute, and The Georgia Industrial Group

August 31, 1990

Supreme Court, U.S.
FILED
AUG 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 89-2001, 90-131

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
Petitioners,
v.
COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,
v.
COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR CERTAIN RESPONDENTS IN OPPOSITION

GILES D. H. SNYDER
STEPHEN J. SMALL
COLUMBIA GAS TRANSMISSION CORPORATION
1700 MacCorkle Ave., S.E.
Charleston, W.Va. 25325-1273
(304) 357-2326

JOHN H. PICKERING
Counsel of Record
LOUIS R. COHEN
TIMOTHY N. BLACK
GARY D. WILSON
SUSAN D. MCANDREW
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
Attorneys for Columbia Gas Transmission Corporation

August 31, 1990

(Attorneys Continued on Inside Cover)

BEST AVAILABLE COPY

DANIEL L. SCHIFFER
MICHIGAN CONSOLIDATED GAS COMPANY
500 Griswold Street
Detroit, MI 48226
(313) 256-5206

JEFFREY M. PETRASH
DICKINSON, WRIGHT, MOON, VAN DUSEN & FREEMAN
1901 L Street, N.W.
Washington, D.C. 20036
(202) 457-0160
Attorneys for Michigan Consolidated Gas Company

KATHLEEN A. KANE
OBERMAYER, REBMANN, MAXWELL & HIPPEL
14th Floor, Packard Bldg.
15th & Chestnut Streets
Philadelphia, PA 19102
(215) 665-3222
Attorney for Philadelphia Electric Company

LARITO FARINAS
PHILADELPHIA GAS WORKS
800 West Montgomery Ave.
Philadelphia, PA 19122
(215) 684-6982
Attorney for Philadelphia Gas Works

EDWARD J. GRENIER, JR.
WILLIAM H. PENNIMAN
GLEN S. HOWARD
STERLING H. SMITH
SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2404
(202) 383-0100
Attorneys for The Process Gas Consumers Group

MARY E. BALUSS
CHRISTOPHER J. BARR
MORGAN, LEWIS & BOCKIUS
1700 M Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 467-7142
Attorneys for UGI Corporation

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the power of the Federal Energy Regulatory Commission, under section 4(d) of the Natural Gas Act, 15 U.S.C. § 717c(d), to "allow changes [in rates] to take effect without requiring the thirty days' notice herein provided for," includes the power to authorize pipelines to collect retroactive additional charges for gas sold long before any filing reflecting the additional charges.

RULE 29.1 STATEMENT

Respondent Columbia Gas Transmission Corporation is a wholly-owned subsidiary of The Columbia Gas System, Inc.

Respondent Michigan Consolidated Gas Company is a wholly-owned subsidiary of MCN Corporation.

Respondent UGI Corporation has one subsidiary that is not wholly-owned, A P Propane, Inc.

TABLE OF CONTENTS

	Page
STATEMENT	1
1. Producers Collection of Section 110 Costs from Pipelines	3
2. Pipelines' Recovery of Section 110 Costs from Their Customers	4
3. Commission Approval of Direct Billing	8
4. Judicial Review and Reversal of Retroactive Direct Billing	10
5. The Commission's Effort To Sanction Retroactive Direct Billing by Waiver	12
6. The Decision Below Rejecting the Claimed Waiver Authority To Impose Retroactive Rate Increase	13
ARGUMENT	13
Certiorari Is Not Warranted in This Case	14
There Is No Reason to Hold This Case for Disposition of the Petitions in AGD	22
CONCLUSION	23
APPENDIX	1a

TABLE OF AUTHORITIES

Cases	Page
Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981)	*passim*
Associated Gas Distribs. v. FERC, 893 F.2d 349 (D.C. Cir. 1989), *reh'g denied*, 898 F.2d 809 (D.C. Cir. 1990), *petitions for cert. pending*, Nos. 89-1988, *et al.*	22
Atlantic Ref. Co. v. Public Serv. Comm'n, 360 U.S. 378 (1959)	17
City of Piqua v. FERC, 610 F.2d 950 (D.C. Cir. 1979)	16, 18, 19
FPC v. Sierra Pacific Power Co., 350 U.S. 348 (1956)	15, 18
FPC v. Tennessee Gas Transmission Co., 371 U.S. 145 (1962)	16
Hall v. FERC, 691 F.2d 1184 (5th Cir.), *cert. denied sub nom. Arkla, Inc. v. Hall*, 464 U.S. 822 (1983)	14, 18
Maislin Indus., U.S., Inc. v. Primary Steel, Inc., No. 89-624, 110 S. Ct. 2759 (1990)	18, 21
Mid-Louisiana Gas Co. v. FERC, 664 F.2d 530 (5th Cir. 1981), *aff'd in part and vacated in part sub nom. Public Serv. Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983)	10
Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951)	21
Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1975)	16
Panhandle Eastern Pipe Line Co. v. FERC, 777 F.2d 739 (D.C. Cir. 1985)	10
Public Serv. Co. of New Hampshire v. FERC, 600 F.2d 944 (D.C. Cir.), *cert. denied*, 444 U.S. 990 (1979)	5, 21
Texas Eastern Transmission Corp. v. FERC, 769 F.2d 1053 (5th Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986)	19, 20
Towns of Concord & Wellesley v. FERC, 844 F.2d 891 (1st Cir. 1988)	18
Transwestern Pipeline Co. v. FERC, 897 F.2d 570 (D.C. Cir. 1990)	5

TABLE OF AUTHORITIES—Continued

Page

United Gas Pipe Line Co. v. Mobile Gas Serv. Co., 350 U.S. 332 (1956) 18

Statutes and Regulations

Natural Gas Policy Act of 1978, 15 U.S.C. § 3301 *et seq.* (1988) 3
15 U.S.C. § 3320(a) (1988) 3
Natural Gas Act, 15 U.S.C. § 717 *et seq.* (1988):
Section 4(c), 15 U.S.C. § 717c(c) (1988) 14
Section 4(d), 15 U.S.C. § 717c(d) (1988) 1, 2, 14
Section 5, 15 U.S.C. § 717d (1988) 15, 16
18 C.F.R. §§ 154.301-154.310 (1990) 5
18 C.F.R. § 271.1104(d)(1) (1990) 4
48 Fed. Reg. 5180 (1983) 4

Administrative Orders and Decisions

Order No. 94, *Order Amending Interim Regulations Under the Natural Gas Policy Act of 1978 and Establishing Policy Under the Natural Gas Act*, FERC Stats. & Regs., Regs. Preambles ¶ 30,178 (July 25, 1980) 3-4, 19
Order No. 94-A, *Regulations Implementing Section 110 of the Natural Gas Policy Act of 1978 and Establishing Policy Under the Natural Gas Act*, FERC Stats. & Regs., Regs. Preambles ¶ 30,419 (Jan. 24, 1983) 4, 6
Order No. 399-A, *Refunds Resulting From Btu Measurement Adjustments*, FERC Stats. & Regs., Regs. Preambles ¶ 30,612 (Nov. 20, 1984) 6
Order No. 436, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs., Regs. Preambles ¶ 30,665 (Oct. 9, 1985) 20
Order No. 452, *Purchased Gas Cost Adjustment Provision in Natural Gas Pipeline Companies' FPC Gas Tariffs*, 47 FPC 1049 (1972) 5

TABLE OF AUTHORITIES—Continued

Page

Order No. 473, *Compression Allowances and Protest Procedures Under National Gas Policy Act Section 110*, FERC Stats. & Regs., Regs. Preambles ¶ 30,747 (June 3, 1987) 2
Order No. 473-A, *Compression Allowances and Protest Procedures Under National Gas Policy Act Section 110*, FERC Stats. & Regs., Regs. Preambles ¶ 30,788 (Dec. 29, 1987) 2
Order No. 500, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs., Regs. Preambles ¶ 30,761 (Aug. 7, 1987) 20
Consolidated Gas Supply Corp., 24 FERC ¶ 61,271 (1983) 10
Tennessee Gas Pipeline Co., 29 FERC ¶ 61,150 (1984) 5
Texas Eastern Transmission Corp., 28 FERC ¶ 61,182 (1984) 6
Transcontinental Gas Pipe Line Corp., 27 FERC ¶ 61,227 (1984) 10
Transcontinental Gas Pipe Line Corp., 29 FERC ¶ 61,148 (1984) 7
Transcontinental Gas Pipe Line Corp., 31 FERC ¶ 61,129 (1985) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-2001

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
Petitioners,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*

No. 90-131

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR CERTAIN RESPONDENTS IN OPPOSITION

STATEMENT

This case involves orders of the Federal Energy Regulatory Commission granting "waivers" of the notice requirement of section 4(d) of the Natural Gas Act, 15 U.S.C. § 717c(d), and thereby purportedly allowing the private petitioners, four interstate pipelines, to collect additional charges for gas sold during earlier periods. Respondents are downstream pipelines, local distribution

companies, and industrial users that are direct or indirect customers of the petitioner pipelines.[1]

The Commission initially authorized the retroactive additional charges in orders issued in 1985. In 1987, the court of appeals struck down these orders because the additional charges violated the Act's requirement that a pipeline charge only the rates on file at the time the gas is sold. Pet. App. 42a-56a (*Columbia I*).[2] No party sought review of that decision in this Court.

In 1988, on remand, the Commission issued the order now under review,[3] Pet. App. 17a-26a, again authorizing the retroactive additional charges, but now relying on its power under section 4(d) to "allow changes to take effect without requiring the thirty days' notice herein provided for." 15 U.S.C. § 717c(d). In 1990, in the decision from which petitioners now seek review, Pet. App. 1a-14a (*Columbia II*), the court of appeals held that the Commis-

[1] The respondents for which this brief is filed are Columbia Gas Transmission Corporation, Michigan Consolidated Gas Company, Philadelphia Electric Company, Philadelphia Gas Works, the Process Gas Consumers Group, and UGI Corporation.

[2] "Pet App." refers to the appendix to the petition for writ of certiorari in *Panhandle Eastern Pipe Line Co. v. Columbia Gas Transmission Corp.*, No. 89-2001 (filed June 22, 1990).

[3] In addition to the Commission's order in the remanded proceedings, the Commission in 1988 issued an order authorizing one of the pipeline petitioners, Panhandle Eastern Pipe Line Company (Panhandle), to direct bill its customers for $17 million in certain other production-related costs that had been allowed by Orders Nos. 473 and 473-A (*Compression Allowances and Protest Procedures Under NGPA Section 110*, FERC Stats. & Regs., Regs. Preambles ¶¶ 30,747, 30,788 (1987)) based on customers' purchases from December 1979 to December 1984. Pet. App. 33a-40a. As in the orders issued on remand after *Columbia I*, the Commission relied on its section 4(d) power to waive the thirty days' notice requirement to authorize Panhandle's direct billing procedure. In the consolidated proceedings below, the court of appeals struck down the Order No. 473 direct billing order as well as the direct billing orders issued on the remand.

sion's power to waive the 30-day notice period of section 4(d) did not authorize it to impose, on unwarned and unwilling customers, a price increase for sales that occurred as much as eight years prior to the rate filing.

Neither in *Columbia I* nor in *Columbia II* did the court of appeals bar the petitioner pipelines from recovering the production-related costs that gave rise to the charges at issue. It held only that such recovery must be done prospectively—for example, by including the costs in the pipelines' charges to customers for current and future service. *See id.* at 4a, 54a. As described below, other interstate pipelines recovered the same production-related costs from their customers in that manner, as did one of the petitioner pipelines before it sought and obtained authority from the Commission in 1985 to switch to the retroactive recovery method held unlawful in this case.

1. Producers Collection of Section 110 Costs from Pipelines

In the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. § 3301 *et seq.*, Congress established ceiling prices for "first sales"[4] of certain categories of natural gas. In section 110 of the NGPA, 15 U.S.C. § 3320(a), Congress authorized the Commission to allow recovery by first sellers (*i.e.*, gas producers) of certain production-related costs, including compression and gathering costs, in addition to the maximum prices otherwise permitted by the statute.

In 1978, the Commission adopted interim regulations governing producers' applications for recovery of production-related costs pursuant to section 110. In 1980, however, in Order No. 94, *Order Amending Interim Regulations Under the Natural Gas Policy Act of 1978 and Establishing Policy Under the Natural Gas Act*, FERC

[4] Generally, "first sales" of natural gas are sales by gas producers to pipeline companies that in turn resell the gas to other pipelines, wholesale distributors, and large industrial customers.

Stats. & Regs., Regs. Preambles ¶ 30,178 (July 25, 1980), the Commission announced that effective July 25, 1980, it would no longer accept producers' applications for recovery of compression or gathering costs until it had completed proceedings to determine appropriate generic allowances for such costs. *Id.* at 31,218. The Commission assured producers, however, that upon adoption of such allowances "a retroactive collection procedure will be provided under which the [generic allowances] . . . will be applied to costs incurred with respect to gas delivered on or after the effective date of this Rule [July 25, 1980] *if collection of such costs is contractually authorized.*" *Id.* (emphasis added).

In 1983, in Order No. 94-A, *Regulations Implementing Section 110 of the Natural Gas Policy Act of 1978 and Establishing Policy Under the Natural Gas Act*, FERC Stats. & Regs., Regs. Preambles ¶ 30,419 (Jan. 24, 1983), and an accompanying interim rule,[5] the Commission promulgated its promised regulations authorizing producers to collect compression and gathering costs from their pipeline purchasers. Producers were authorized to collect production-related costs on a current basis beginning with the March 7, 1983, effective date of the new regulations. *Id.* at 30,355. With respect to costs incurred by producers in the period July 25, 1980, through March 7, 1983, producers were authorized to collect these costs retroactively in installments between March 1983 and December 1984 if their contracts with pipelines so provided. *Id.* at 30,368.

2. Pipelines' Recovery of Section 110 Costs from Their Customers

Order No. 94 and Order No. 94-A and the accompanying regulations dealt with collection of production-related costs by the producers from their pipeline first-purchas-

---

[5] 48 Fed. Reg. 5180 (1983); *see* 18 C.F.R. § 271.1104(d)(1) (1990).

ers. Neither order dealt with how the producer charges would be recovered by first-purchaser pipelines from *their* customers. At the time Orders 94 and 94-A were issued, however, long established Commission policy provided for the recovery of such costs by means of the purchased gas adjustment ("PGA") clause of a pipeline's tariff.[6] Current production-related costs, which pipelines pay currently to gas producers, would be reflected in the pipelines' current PGA-adjusted rates. With regard to a pipeline's installment payments to producers for retroactive charges, the Commission's regulations governing recovery of costs of gas purchased by pipelines expressly provided (and still provide) for prospective adjustments to a pipeline's commodity rates in order to compensate for over- and under-recovery of the costs of gas purchased in prior periods. *See* Comm. Pet. 5 n.3; 18 C.F.R. § 154.305 (1990).[7] Such prospective rate adjustments had long been held by the Commission to be the proper method of recovery by a pipeline for "deferred costs" paid to a producer in a present period but attributable to gas delivered in a past period.[8] Thus, to

---

[6] *See* Order No. 452, *Purchased Gas Cost Adjustment Provision in Natural Gas Pipeline Companies' FPC Gas Tariffs*, 47 FPC 1049 (1972); *see generally*, 18 C.F.R. §§ 154.301-154.310 (1990).

[7] While the PGA mechanism for "truing up" recovery of past gas costs is a departure from the normal process of setting fixed rates for the future based on estimates derived from historical experience, the court of appeals has held that it does not violate the filed rate doctrine or the rule against retroactive rate making since the amounts in question are included in current gas sales rates, and customers can take them into account in making their purchase decisions. *See Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 579-80 (D.C. Cir. 1990). Also, the PGA mechanism itself is on file as part of the pipeline's tariffs. *Cf. Public Serv. Co. of New Hampshire v. FERC*, 600 F.2d 944, 960 (D.C. Cir.), *cert. denied*, 444 U.S. 990 (1979).

[8] *See Tennessee Gas Pipeline Co.*, 29 FERC ¶ 61,150 at 61,327 (1984) (noting use of PGA mechanism to amortize deferred costs over prospective six-month period as traditional means of recovery for past period gas costs).

the extent that Order No. 94-A mentioned the *pipeline's* recovery at all, it clearly contemplated that such costs would be recovered in the traditional manner, *i.e.*, prospectively through the pipeline's PGA mechanism.[9]

Consistent with the Commission's established policy, when producers began to bill pipelines for current and retroactive compression and gathering cost allowances in 1983, some interstate pipelines paid the producers and collected those costs from their customers by means of prospective adjustments to their PGA rates. With regard to "amounts relating to past periods," the Commission specifically concluded that they were "appropriate for recovery by way of . . . [the] PGA clause through inclusion in Account No. 191 and a subsequent surcharge." *Texas Eastern Transmission Corp.*, 28 FERC ¶ 61,182, at 61,344 (1984). In accordance with the normal PGA procedure, such surcharges were recovered from pipeline customers in the six-month PGA period immediately following the payments to producers. *See* Comm. Pet. 5 n.3.

Other pipelines, however, delayed paying producers both the current and the retroactive production-related costs.[10] Beginning in 1983, some pipelines were starting to have difficulty in selling gas at prices that reflected their high-cost purchases in the late 1970s and early 1980s. By delaying payment of production-related costs, a pipeline could lower its PGA-adjusted prices relative to the PGA rates of pipelines that had instituted produc-

---

[9] The Commission noted that an interstate pipeline "may receive compensation for paying . . . section 110 allowances *through its purchased gas adjustment clause.*" Order No. 94-A, FERC Stats. & Regs. at 30,369 (emphasis added).

[10] *See* Order No. 399-A, *Refunds Resulting From Btu Measurement Adjustments*, FERC Stats. & Regs., Regs. Preambles ¶ 30,612 at 31,208 (Nov. 20, 1984).

tion-cost payment and PGA recovery promptly, as the Commission's 1983 order had contemplated.

Delay in payment of production costs (and in their PGA recovery) reduced a pipeline's rates initially, but it had the effect of exacerbating the difficulty of eventual recovery of these costs from the pipeline's customers by building up the unpaid costs and increasing the size of the next PGA rate adjustment when the costs were eventually paid. To deal with this problem, petitioner Transcontinental Gas Pipe Line Corporation (Transco) sought and obtained permission in its September 1984 PGA filing to implement a special 4.5 cent prospective surcharge during the six months beginning November 1, 1984, for recovery of installments of retroactive production-related costs it anticipated paying in the last half of 1984, as well as a regular 5.5 cent prospective surcharge to recover "production related charges, both 'current' and 'retroactive,' that it had paid in the prior six months." *Transcontinental Gas Pipe Line Corp.*, 29 FERC ¶ 61,148, at 61,319 (1984).

In 1985, however, Transco—which had by then recovered over one quarter of the amounts it had paid to producers for production-related costs—reversed course. In its May 1985 PGA filing, Transco deleted the PGA surcharge the Commission had previously authorized and announced an intent to charge such amounts to its customers by a retroactive "direct bill." *See Transcontinental Gas Pipe Line Corp.*, 31 FERC ¶ 61,129 (1985).[11] Subsequently, Transco filed its "direct bill" proposal, which assessed each customer a share of the production related charges attributable to the gas Transco purchased from producers between July 1980 and August 1984 in proportion to that customer's share of gas purchased

---

[11] To "avoid a double-collection," Pet. App. 70a, Transco proposed to refund the approximately $32 million that it had already recovered through its prospective PGA-adjusted rates.

from the pipeline in that period.[12] Appendix, *infra*, 5a. These charges were to be independent of and unaffected by the customer's current level of contractual entitlement or purchases from the pipeline. As the court of appeals held in *Columbia I*, the proposed charges amounted to a retroactive surcharge on rates paid by pipeline customers for gas they had purchased in past periods. Pet. App. 51a.

Transco's petition was not based on any claim that continued recovery of its production-related costs through its PGA mechanism would be impossible. Nor did Transco concede that its objective was to keep its current charges low by imposing a retroactive surcharge on completed transactions. Rather, Transco asserted that direct billing "is the most logical and equitable method of assigning cost responsibility for this extraordinary, out-of-period item." Appendix, *infra*, 15a.

3. Commission Approval of Direct Billing

In August 1985, the Commission granted Transco's direct billing proposal, finding it "equitable" because it "imposes the cost responsibility on the customers who bought the gas." Pet. App. 70a.

---

[12] The petitioner pipelines state that the question presented is whether the Commission may permit recovery of costs that arose during the 1980-83 "moratorium" period and argue throughout their petition that the Commission's "moratorium" on collection by producers of production-related costs makes the retroactive recovery by pipelines equitable and lawful. *See* Pan. Pet. (i), 3, 7, 11, 16, 20; *cf.* Comm. Pet. 8, 12. It should be noted, however, that the "moratorium" was lifted as of March 7, 1983. Yet in each case, the petitioner pipelines sought and were authorized to recover production-related costs incurred for gas sold in a "retroactive period" that went well beyond the end of the "moratorium." *See* Pet. App. 61a (Transco: July 25, 1980 to August 31, 1984); 87a (Texas Gas: August 1, 1980 to December 31, 1984); 99a (Trunkline: July 25, 1980 to February 28, 1985); 110a (Panhandle: August 1, 1980 to February 28, 1985).

The Commission rejected contentions by a number of protesters that the proposal constituted an unlawful retroactive increase in the rates charged for past gas sales. The Commission dismissed these contentions as "without merit" and "in effect . . . a collateral attack on Order No. 94-A" because "Order No. 94-A expressly authorized the collection of retroactively effective allowances which, to the extent directly billed now, are a cost to those customers." *Id.*[13]

Following Transco's direct billing proposal, a number of other pipelines—including Texas Eastern Transmission Corporation and petitioners Texas Gas Transmission Corporation, Panhandle Eastern Pipe Line Company and Trunkline Gas Company—also filed direct billing proposals modeled after Transco's.[14] In a series of orders issued late in 1985, the direct billing proposals of these four pipelines were approved on the basis of the *Transco* precedent. Pet. App. 79a-86a (Texas Eastern); 87a-96a (Texas Gas); 97a-109a (Trunkline); 110a-123a (Panhandle). At about the same time, on rehearing of its Transco approval, the Commission again rejected contentions that the direct billing scheme constituted an unlawful retroactive rate increase, asserting once again that "Order No. 94-A expressly authorized the collection of retroactively effective allowances." *Id.* at 129a. Responding to the argument that similar deferred costs had

---

[13] The Commission also waived the provisions of its regulations requiring that all changes in pipeline rates be reflected in filed tariff sheets. The Commission found that no purpose would be served by such filing in view of the retroactive nature of the new "rates":

> Any such [tariff] sheets would necessarily change each month and would consist of a listing company-by-company, of the actual amounts billed. . . . [T]he original gas costs to which these section 110 payments apply were reflected on tariff sheets. *Here, we are permitting retroactive change in those costs* . . . .

Pet. App. 72a (emphasis added).

[14] *See id.* at 79a; 87a; 97a; 110a.

always been recovered prospectively through PGA adjustments, the Commission stated that the production-related cost payments were "different" because "these amounts [the production-related costs] were authorized by special rule on a continuing, not a one-time only, basis, and are so large as to warrant special treatment." [15] *Id.* Subsequently, the Commission likewise denied rehearing of its approval of the four other pipelines' direct billing proposals. *Id.* at 134a (Texas Eastern); 135a (Texas Gas); 136a-39a (Trunkline); 140a-42a (Panhandle).

4. Judicial Review and Reversal of Retroactive Direct Billing

A number of customers of the five pipelines challenged these orders in the D.C. Circuit on the ground that they constituted an unlawful retroactive rate increase. In *Columbia I*, the court of appeals overturned the Commission's approval of the five direct billing proposals. The court found that the orders violated the rule against retroactive ratemaking, which it characterized as "derived from the provisions in the NGA requiring sellers of natural gas to file their rates with the Commission

---

[15] Claims that these costs are "extraordinary" are, at the very least, exaggerated. For example, in May 1984 the Commission found a Transco proposal for PGA recovery of some $61 million in deferred costs over a six month period to be "consistent" with Transco's history of recovering other deferred costs ranging from $53 million to $89 million in other recent six-month periods. *Transcontinental Gas Pipe Line Corp.*, 27 FERC ¶ 61,227 at 61,437 n.6 (1984). Similarly, in 1984 the Commission authorized another petitioner—Panhandle—to recover through its PGA over a 39-month period an "enormous" build-up of unrecovered gas costs attributable to past periods amounting to some $270 million. *See Panhandle Eastern Pipe Line Co. v. FERC*, 777 F.2d 739 (D.C. Cir. 1985). Some pipelines also recovered through PGA adjustments the costs arising from repricing their own production pursuant to the decision in *Mid-Louisiana Gas Co. v. FERC*, 664 F.2d 530 (5th Cir. 1981), *aff'd in part and vacated in part sub nom. Public Serv. Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983). *See, e.g., Consolidated Gas Supply Corp.*, 24 FERC ¶ 61,271 (1983).

[section 4] and defining its authority to modify them [section 5]." Pet. App. 52a. The court described these statutory provisions as forming the basis for the "filed rate doctrine" as articulated by this Court in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981) (*Arkla*):

> [T]he [Natural Gas] Act bars a regulated seller of natural gas from collecting a rate other than the one filed with the Commission and prevents the Commission itself from imposing a rate increase for gas already sold.

The court found that the direct billing orders of the Commission violated the rule against retroactive ratemaking and the filed rate doctrine because:

> the effect of the orders is quite clear: downstream purchasers are expected to pay a surcharge, over and above the rates on file at the time of sale, for gas they had already purchased. However described, this constitutes a retroactive rate increase that we find to be prohibited by the NGA.

Pet. App. 51a.

The court rejected the Commission's argument that Order No. 94-A in 1983 had established a "retroactive collection procedure" for pipelines. The court pointed out that Orders 94 and 94-A were addressed solely to recovery of production-related costs by producers from first purchasers, and the orders did not deal with the procedures for collection by pipelines from their customers. *Id.* The court concluded that there was no reason at all for pipeline customers in 1980-83 to suppose that they would be subject to retroactive direct charges, since such recovery had never been permitted by Commission policy and the Commission's regulations expressly required that such deferred costs be recovered prospectively through the PGA mechanism.

The Commission petitioned for rehearing, asserting for the first time that it had authority under section 4(d) of the Natural Gas Act to "waive" the filed rate doctrine to allow the direct billing procedures to go into

effect. *See* Pet. App. 58a-59a. The court denied rehearing but stated that the Commission could consider on remand whether the statute permits a waiver of the filed rate doctrine and, if so, whether such a waiver would be appropriate in the circumstances of these cases. *Id.* at 59a.

5. The Commission's Effort To Sanction Retroactive Direct Billing by Waiver

Without any hearing or further proceedings, the Commission on remand again approved the same direct billing mechanisms that the court had struck down in *Columbia I*. Pet. App. 17a-26a. This time, the Commission relied solely on its authority under section 4(d) of the Act to "allow changes to take effect without requiring the thirty days' notice herein provided for." The Commission asserted that its "authority to waive the filed rate doctrine and its discretion whether to exercise this authority in particular circumstances are unquestioned," subject only to the statutory requirement that the waiver must be based on "good cause shown." *Id.* at 21a. FERC found that good cause existed for waiver of the filed rate doctrine in each of the remanded proceedings for the same reasons advanced in its original orders approving the rate changes. *Id.* at 22a-23a.

Several of the present respondents sought rehearing, arguing that the Commission could not rely on its waiver authority under section 4(d) to impose a retroactive rate increase, that the Commission had failed to explain its departure from its longstanding policy of permitting waivers only to allow previously contracted-for rates to take effect prospectively from the date set by the contract, and that the Commission does not have equitable powers to take actions that are contrary to the statute. *See* Pet. App. 28a-29a. The Commission rejected these arguments on the basis of an unexplained "overwhelming public interest" that would be "impeded" by normal prospective ratesetting. *Id.* at 32a.

6. The Decision Below Rejecting the Claimed Waiver Authority To Impose Retroactive Rate Increases

In *Columbia II*, the court of appeals rejected the Commission's argument that its waiver authority permits it to allow a pipeline to impose additional charges for transactions completed before any rate filing containing the charges. The court noted that the language of section 4(d) only authorizes the Commission to allow rate changes "to take effect without requiring the thirty days' notice herein provided for." Pet. App. 10a. The court also pointed out that the few decisions that have allowed rate changes to become effective as of a date prior to their filing had all been cases in which the customers had by contract prospectively consented to the pre-filing effective date. *Id.* at 11a-12a. The court concluded, without reaching the question of "good cause," that the Commission lacked statutory power to do what it did: "[W]e are unaware of any principle in equity or law that empowers an agency to ignore explicit legislative commands . . . ." *Id.* at 13a.

The private petitioners, but not FERC, sought rehearing *en banc*, which was denied unanimously. *Id.* at 15a.

ARGUMENT

The court of appeals properly rejected FERC's assertion, made for the first time in this case, that FERC's power under section 4(d) of the Natural Gas Act to allow rate "changes to take effect without requiring the thirty days' notice herein provided for" includes the power to allow a pipeline to impose a retroactive additional charge for gas sales that occurred years earlier. FERC's reading of the statute would obliterate (but only in favor of sellers and not for the protection of customers) the well-established principle that FERC has "no power to alter a rate retroactively." *Arkla*, 453 U.S. at 578. This case presents no issue worthy of this Court's review.

Certiorari Is Not Warranted in This Case

1. Contrary to the Solicitor General's submission, the court of appeals' ruling was based squarely on the statute. In *Columbia I*, from which no party sought review in this Court, the court of appeals first found that "the effect of [FERC's] orders is quite clear: downstream purchasers are expected to pay a surcharge, over and above the rates on file at the time of sale, for gas they had already purchased. However described, this constitutes a retroactive rate increase." Pet. App. 51a.[16]

Decades of authority have established that under the Natural Gas Act, as under other major federal ratemaking statutes, the Commission may neither authorize a "rate increase for gas already sold" nor impose a "retroactive rate alteration." *Arkla*, 453 U.S. at 578 and n.8. This rule against retroactive ratemaking, as the court of appeals held (*Columbia I*, Pet. App. 51a-52a), flows directly from sections 4 and 5 of the Act, which require that charges for jurisdictional natural gas service be set forth in publicly filed tariffs and that any changes in those rates be made prospectively. In *Columbia II*, the court's discussion centered on "the scope of the section 4(d) waiver authority" (*id.* at 9a), and its ruling was that "the statutory language of section 4(d) and the logic of [certain earlier decisions] deny the Commission the authority its claims." *Id.* at 10a.

Section 4(c), 15 U.S.C. § 717c(c), requires that rates be set forth in tariffs filed with the Commission. Pipeline-initiated changes to filed rates are governed by section 4(d), 15 U.S.C. § 717c(d). That section first

---

[16] Neither the Commission nor the pipeline petitioners challenged or now challenge the court of appeals' holding in *Columbia I* that the "direct billing" proposals approved by the Commission impose on pipeline customers an added charge for gas those customers had already purchased. As the Fifth Circuit held in *Hall v. FERC*, 691 F.2d 1184, 1191 (5th Cir.), *cert. denied sub nom. Arkla, Inc. v. Hall*, 464 U.S. 822 (1983), a "purer example" of a retroactive rate increase would be "difficult to imagine."

provides that no change may be made in any filed rate "except after thirty days' notice to the Commission and to the public." The notice may be given only "by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes . . . and the time when the change or changes *will* go into effect." *Id.* (emphasis added). The next sentence provides that the Commission "for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they *shall* take effect and the manner in which they *shall* be filed and published." *Id.* (emphasis added).[17]

On its face, section 4(d) gives the Commission only the power to shorten or eliminate the required thirty-day notice period.[18] The statute requires a pipeline to make its filing thirty days before the rate changes "will" go into effect. It permits the Commission to dispense with this notice, but only by an order specifying when the changes "shall" go into effect. Nothing in this language suggests that the Commission may allow an additional charge to be imposed on gas sales completed before the change-of-rate filing is made.

Consistent with these basic statutory provisions, this Court has held that the Commission may not allow a

---

[17] Section 5, 15 U.S.C. § 717d, which is not involved in this case, provides the only other means by which rates may be changed, and it too makes clear that changes are to be prospective only. It provides that if the Commission reaches a determination that existing rates are unjust or unreasonable, the Commission may then prescribe the just and reasonable rate "to be thereafter observed." *See FPC v. Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956). (*Sierra* arose under the corresponding section of the Federal Power Act. The Court has an "established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes." *Arkla*, 453 U.S. at 577 n.7.)

[18] The Commission concedes in its petition that section 4(d) "can be" so read. Comm. Pet. 13.

pipeline to alter rates retroactively, pursuant to new tariffs filed by the pipeline under section 4. *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 152-53 (1962). The D.C. Circuit has followed suit, holding that the Act bars the "Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate." *City of Piqua v. FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979) (quoted with approval in *Arkla*, 453 U.S. at 578). That court has described this as a "cardinal principle of ratemaking" that binds both the utility in initially setting its rates and the Commission in approving or imposing changes in those rates. *Nader v. FCC*, 520 F.2d 182, 202 (D.C. Cir. 1975). Not surprisingly, neither the Commission nor the petitioner pipelines have cited any decision of this or any other court permitting the retroactive imposition of an additional charge on customers for gas bought in prior periods.[19]

The reading of the statute now urged by the Commission and the petitioner pipelines would produce a bizarre result contrary to the clear intent of the Act. Both petitioners are clear that the Commission has no authority to impose a retroactive rate *reduction* under section 5, even after finding (on a customer complaint or its own initiative) that a filed rate is unjust and unreasonably high (Comm. Pet. 17; Pan. Pet. 13-14): Section 5 permits the Commission only to prescribe a rate "to be thereafter observed," and this Court has squarely held that FERC is limited by the section to prescribing a reasonable rate for the future. *See* note 17, *supra*. But the Commission argues it may approve retroactive rate *increases* sought

[19] Petitioner pipelines' suggestion, Pet. 11, that this case does not "concern the filed rate doctrine," since "no party here is seeking to enforce a rate not filed with and accepted by, the Commission," is specious. It is directly refuted by this Court's holding in *Arkla* that a "retroactive rate increase" is "precisely what the filed rate doctrine forbids." 453 U.S. at 578-79. Indeed, on the remand after *Columbia I*, the Commission stated that the issue was whether it should "waive the filed rate doctrine." Pet. App. 21a.

by a pipeline under section 4 whenever it finds "good cause." That asymmetrical outcome would stand on its head a statutory scheme whose primary purpose was to provide a "complete, permanent and effective bond of protection" for consumers. *Atlantic Ref. Co. v. Public Serv. Comm'n*, 360 U.S. 378, 388 (1959). It is hardly surprising that no court or (until these cases) agency has so read the statute.

2. Petitioners make several further arguments in support of a grant of the writ in this case. None has merit.[20]

a. Contrary to the submissions of the petitioner pipelines, this case does not present the "waiver" question left unresolved by this Court in *Arkla*. That case involved a rate that had been *contractually agreed to* but not filed. The Court said, 453 U.S. at 578 n.8 (emphasis by the Court):

> Although the Commission may not *impose* a retroactive rate alteration . . . it may 'for good cause shown' . . . waive the usual requirement of timely filing of an alteration in a rate. Assuming, *arguendo*, that waiver is available for retroactive collection of a higher rate than the one on file, we note that [the Commission expressly rejected any waiver in this case].

---

[20] The petitioner pipelines imply that this case is important because what is at issue is "approximately $1.5 billion" in industry-wide "moratorium" period costs. Pan. Pet. 3. Where the figure came from is unclear. (The Commission at one point noted estimates of "up to" that figure. Pet. App. 29a n.8). But in any event, most of these costs have long since been paid and recovered through mechanisms that have not been challenged.

The Commission more accurately estimates the magnitude of the costs at issue here as the approximately $500 million in production-related costs that petitioner pipelines and Texas Eastern have collected under the direct bill mechanisms authorized by FERC's orders. Comm. Pet. 7 n.5. A part of that amount, however, plainly related to recovery of costs arising out of gas sold well after the end of the "moratorium" period. *See* note 12, *supra*.

The present case, unlike *Arkla*, involves an attempt to "impose" a retroactive rate increase on unwilling customers who fully paid the rates that were on file when the sales in question were completed; nothing in *Arkla* suggests that there is any open question about whether the Commission has power to do that.

b. Petitioners cite cases in which courts of appeals have permitted the Commission, acting under section 4 (d), to sanction a pre-filing effective date for a rate change agreed to by the parties before it became effective.[21] The rationale for these rulings was that the change was not "retroactive" where the parties to the change had agreed to it in advance by contract. The continuing validity of these decisions may be in question;[22] in any event, they have no bearing here: whether the Act permits the Commission to allow a private contract, phrased prospectively, to take effect, in accordance with the wishes of the parties, prior to the date of filing is *not* the issue in this case. What the court below declared (consistent with every other decided case) is that the seller and the Commission together cannot retroactively *impose* a rate change never agreed to by the customer.

---

[21] Comm. Pet. 14-15, citing *City of Piqua*, 610 F.2d 950 (D.C. Cir. 1979); *Hall v. FERC*, 691 F.2d 1184 (5th Cir. 1983); *Towns of Concord & Wellesley v. FERC*, 844 F.2d 891 (1st Cir. 1988); Pan. Pet. 14 n.7, citing *City of Piqua*.

[22] All of the cited decisions were rendered before this Court's decision in *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, No. 89-624, 110 S. Ct. 2759 (1990), rejecting the authority of the Interstate Commerce Commission to allow negotiated rather than filed rates to be charged. The Court has, in other contexts, recognized that private contracts have an important role under the Natural Gas Act, which differs in this regard from the Interstate Commerce Act. *See FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Co.*, 350 U.S. 332 (1956). Whether this role distinguishes *City of Piqua*, *Hall*, and *Concord* sufficiently to allow them to survive *Maislin* is a question not presented in this case.

c. The pipeline petitioners stress the fact that in *Texas Eastern Transmission Corp. v. FERC*, 769 F.2d 1053, 1066 (5th Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986), the court of appeals rejected a challenge to FERC's Order No. 94-A, which authorized *producers* to recover earlier production-related costs through retroactive charges to pipelines. But as the Fifth Circuit stressed, "the purchasers [*i.e.*, the pipelines] were on notice as of 1980 [the beginning of the production-cost period, by virtue of FERC Order No. 94] that allowances would eventually be promulgated" (*id.* at 1066). Moreover, Order No. 94 expressly provided for such recovery from pipelines only "if collection of such costs is contractually authorized." FERC Stat. & Regs. at 31,218.

There is no conflict between the decision below and the Fifth Circuit's decision in *Texas Eastern*. The Fifth Circuit's decision allowed retroactive cost recovery *by producers* pursuant to the explicit advance notice given in 1980 in Order No. 94, and in accordance with express authority in the existing contracts between producers and pipelines. *Compare City of Piqua*, 610 F.2d at 954. In the present case, respondent pipeline customers neither received advance notice of the charges in question (by Commission order or otherwise) nor contractually authorized the pipelines to collect them.[23]

As noted above, the decision below does not bar pipelines from recovering from their customers the costs allowed to be charged to them by producers under *Texas-Eastern*;[24] it merely requires that this be done by means that do not constitute a retroactive rate increase.

---

[23] Petitioners suggest that because one of the respondents, Columbia, is itself a pipeline, it was effectively on notice of the charges the Commission ordered in the present case. Even if the accidental status of one of the respondents were pertinent, there can be no question that *no one* was on notice before 1985 that pipeline *customers* would be direct-billed, based on their purchases in 1980-85, for these costs.

[24] For this reason there is no merit to suggestions that the court of appeals' decision violates the "pass through" requirement of the

d. Contrary to FERC's implication, Comm. Pet. 5-6, the restructuring of the gas industry in which pipelines became "open access" transporters has essentially nothing to do with the issues in this case.[25] FERC began authorizing retroactive direct billing of production-related costs *before* it issued FERC Order No. 436,[26] which encouraged pipelines to become open access, and all of the FERC orders that originally authorized such billing by the pipeline petitioners were issued before such petitioners became open-access pipelines.

NGPA. As the Commission has itself recognized, that Act does not require that pipelines be afforded guaranteed recovery of costs, but merely a *fair opportunity* to recover legitimate costs. *See* Order No. 500, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs., Regs. Preambles ¶ 30,761 at 30,786 (Aug. 7, 1987). The Commission and the court of appeals have repeatedly recognized that the PGA mechanism affords such an opportunity to recover gas costs.

[25] The Commission incorrectly states that only one producer began recovery of costs before the 1985 decision of the Fifth Circuit in *Texas Eastern*. Comm. Pet. 5. In fact, the Commission had ordered that all costs for the 1980-83 period be recovered in installments ending in December 1984, and some pipelines paid their producers as the Commission envisioned. *See* p. 6, *supra*.

It may well be that other pipelines delayed paying production-related costs pending judicial review of Order No. 94-A in the hope that it would be reversed on appeal. But there was no stay of Order No. 94-A in effect, and having failed to process and recover production-related costs in the time provided for by the Commission, petitioner pipelines should not be heard to complain as they now do that "the customer base of the pipelines had changed to an unprecedented degree between the lifting of the Commission's moratorium in 1983 and the time of the Fifth Circuit's *Texas Eastern* decision in 1985" by which time "the pipeline segment of the industry was in the process of a massive restructuring." Pan. Pet. 6-7.

[26] *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, FERC Stats. & Regs., Regs. Preambles ¶ 30,665 (Oct. 9, 1985).

Moreover, the argument that the Commission should be able to ignore the filed rate doctrine because it needs "latitude" in order to deal with "the massive restructing of the natural gas market" (Comm. Pet. 19) was decisively answered by this Court in *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, No. 89-624, 110 S. Ct. 2759 (1990). As the Court said there, if "strict adherence" to statutory requirements has become "an anachronism," the responsibility for modifying the statutory scheme lies with Congress. *Id.* at 2771.[27]

Indeed, the expansive view of the Commission's section 4(d) waiver powers espoused by petitioners is fundamentally inconsistent with the view of the filed rate doctrine taken by this Court in *Maislin*. While the role of the filed rate doctrine under the Natural Gas Act is not identical to that under the Interstate Commerce Act, there is no basis for contending that the protective purposes of the doctrine are less fundamental or less grounded in statute here. To the contrary, in light of the long history of interpretation of the Natural Gas Act referred to above, it is clear that what this Court said of the agency's effort to rewrite the statute in *Maislin* is equally true here: "Although the Commission has both the authority and expertise generally to adopt new policies when faced with new development in the industry, . . . it does not have the power to adopt a policy that directly conflicts with its governing statute." 110 S. Ct. at 2770.

---

[27] There is no substance to petitioners' suggestion that the holding below will have untoward effects on the electric power industry. The traditional view of the filed rate doctrine reflected in the decision below has already (and for many years) been applied under the Federal Power Act, with no apparent adverse effects on the electric power industry. *See, e.g., Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246 (1951); *Public Serv. Co. v. New Hampshire v. FERC*, 600 F.2d 944 (D.C. Cir. 1979).

There Is No Reason to Hold This Case for Disposition of the Petitions in *AGD*

The Commission does not seek plenary review in this case but suggests that it be held pending the Court's disposition of the petitions in *Associated Gas Distribs. v. FERC*, 893 F.2d 349 (D.C. Cir. 1989), *reh'g denied*, 898 F.2d 809 (D.C. Cir. 1990), *petitions for cert. pending*, Nos. 89-1988, *et al.* (*AGD*), in which it has sought plenary review. That suggestion is unfounded. The Commission's suggestion assumes that the Court will grant its petition in *AGD*—an assumption that may well prove wrong.[28] But even if review were warranted in *AGD*, ~~that~~ this case presents an essentially different question from that presented here, and resolution of *AGD* is highly unlikely to have any bearing on the outcome here.

The question for which review is sought in *AGD* is whether a surcharge imposed to recover certain pipeline "take-or-pay" costs is, as the court of appeals found, retroactive and, therefore, prohibited by the statute's requirement that a pipeline charge only the "filed rate." No question of a Commission waiver (under section 4(d) or otherwise) is involved in any way in that case. Instead, the Commission's rationale in seeking review in *AGD* is that the costs at issue there are "present" costs merely allocated on the basis of past customer purchase decisions.

In this case, by contrast, no one seriously disputes that the Commission's orders impose a retroactive rate increase otherwise forbidden by the statute;[29] the only

---

[28] Certain of the respondents here are also respondents in *AGD* and have filed a Brief in Opposition setting forth the reasons why certiorari is not warranted in that case. If the Court agrees, the Commission's suggestion here would of course be moot.

[29] The Commission itself has recognized that its orders authorize a "retroactive change" in costs charged to pipeline customers. *See* note 13, *supra*.

question presented is whether the Commission's section 4(d) waiver power enables it to authorize a result it could not otherwise bring about. In sum, there is nothing in the grounds asserted for review in *AGD* that gives any reason to expect that any foreseeable disposition by the Court of those petitions would affect the holding of the court of appeals in this case.

The Commission's suggestion (Pet. 19) that this case is related to *AGD* in that both involved cost allocation by pipelines in the wake of Order No. 436 and the "massive restructuring of the natural gas market" toward open access is simply wrong. As noted above, the FERC orders that originally authorized retroactive direct billing by the petitioner pipelines all preceded the times when the petitioners became open-access pipelines under Order No. 436. Chief Judge Wald, whose dissent from the denial of rehearing *en banc* in *AGD* was based on her (erroneous) understanding of the role of Order No. 436 in that case, concurred in the denial of rehearing here. Pet. App. 15a.

CONCLUSION

For the reasons set forth above, the petitions for writ of certiorari should be denied.

Respectfully submitted,

GILES D. H. SNYDER
STEPHEN J. SMALL
COLUMBIA GAS TRANSMISSION CORPORATION
1700 MacCorkle Ave., S.E.
Charleston, W.Va. 25325-1273
(304) 357-2326

JOHN H. PICKERING
Counsel of Record
LOUIS R. COHEN
TIMOTHY N. BLACK
GARY D. WILSON
SUSAN D. MCANDREW
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000
Attorneys for Columbia Gas Transmission Corporation

DANIEL L. SCHIFFER
MICHIGAN CONSOLIDATED GAS COMPANY
500 Griswold Street
Detroit, MI 48226
(313) 256-5206

JEFFREY M. PETRASH
DICKINSON, WRIGHT, MOON, VAN DUSEN & FREEMAN
1901 L Street, N.W.
Washington, D.C. 20036
(202) 457-0160
Attorneys for Michigan Consolidated Gas Company

KATHLEEN A. KANE
OBERMAYER, REBMANN, MAXWELL & HIPPEL
14th Floor, Packard Bldg.
15th & Chestnut Streets
Philadelphia, PA 19102
(215) 665-3222
Attorney for Philadelphia Electric Company

LARITO FARINAS
PHILADELPHIA GAS WORKS
800 West Montgomery Ave.
Philadelphia, PA 19122
(215) 684-6982
Attorney for Philadelphia Gas Works

EDWARD J. GRENIER, JR.
WILLIAM H. PENNIMAN
GLEN S. HOWARD
STERLING H. SMITH
SUTHERLAND, ASBILL & BRENNAN
1275 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2404
(202) 383-0100
Attorneys for The Process Gas Consumers Group

MARY E. BALUSS
CHRISTOPHER J. BARR
MORGAN, LEWIS & BOCKIUS
1700 M Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 467-7142
Attorneys for UGI Corporation

August 31, 1990

APPENDIX

APPENDIX

APPENDIX

DEPARTMENT OF ENERGY
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C.

Docket No. RP85-148-000

IN THE MATTER OF
TRANSCONTINENTAL GAS PIPE LINE CORPORATION

PETITION OF TRANSCONTINENTAL GAS PIPE LINE CORPORATION FOR AUTHORITY TO INSTITUTE DIRECT BILLING PROCEDURE FOR RETROACTIVE ORDER NO. 94 PAYMENTS

Communications with respect to this Petition should be addressed to:

*R.V. Loftin, Jr., Vice President
and General Counsel
James A. Porter
Transcontinental Gas Pipe Line
Corporation
P.O. Box 1396
Houston, Texas 77251

and

---

* Designated to receive service in accordance with Rule 2010(c) of the Rules of Practice and Procedure.

*Thomas F. Ryan, Jr.
Robert G. Hardy
Andrews & Kurth
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Attorneys for Transcontinental
Gas Pipe Line Corporation

Filed: May 22, 1985

DEPARTMENT OF ENERGY
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D.C.

Docket No. ————————

IN THE MATTER OF
TRANSCONTINENTAL GAS PIPE LINE CORPORATION

PETITION OF TRANSCONTINENTAL GAS PIPE LINE CORPORATION FOR AUTHORITY TO INSTITUTE DIRECT BILLING PROCEDURE FOR RETROACTIVE ORDER NO. 94 PAYMENTS

Transcontinental Gas Pipe Line Corporation (Transco) hereby petitions, pursuant to Rule 207 of the Commission's Rules, 18 C.F.R. § 385.207, for authority to institute a special, one-time direct billing procedure to recover from its customers retroactive payments made pursuant to Order Nos. 94 and 94A, all as more fully explained hereinbelow.

In support of this Petition, Transco respectfully shows as follows:

I.

The names, titles and mailing addresses of the persons to whom correspondence concerning this proceeding are to be addressed are as follows:

R.V. Loftin, Jr., Vice President
and General Counsel
Transcontinental Gas Pipe
Line Corporation
P.O. Box 1396
Houston, Texas 77251

and

Thomas F. Ryan, Jr.
Andrews & Kurth
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

II.

Transco is a corporation duly organized and existing under the laws of the State of Delaware, with its prinpal place of business in Houston, Texas.

Transco is a natural gas company engaged in the transportation and sale of natural gas in interstate commerce by means of its natural gas transmission system extending from its principal sources of natural gas supply in Texas, Louisiana, Mississippi, and the offshore Gulf of Mexico area through the States of Alabama, Georgia, South Carolina, North Carolina, Virginia, Maryland, Pennsylvania, and New Jersey to its termini in the New York City Metropolitan area. To augment its domestic gas supply sources, Transco also imports natural gas from Canada.

III.

SUMMARY OF PROPOSED DIRECT BILLING PROCEDURE [1]

Because of the inequities and undesirable market distortions inherent in recovering retroactive Order No. 94 costs through PGA filings, Transco seeks authorization to bill customers directly for such costs. As more fully explained below, Transco proposes to calculate each customer's share of such costs for the retroactive period (hereinafter defined as the period July 25, 1980 through August 31, 1984 unless otherwise indicated) based upon a matching of the incurrence of Order No. 94 costs, by month, to the customer's share of system purchases during such months. Such amounts will be billed directly, including interest, in equal monthly installments over a succeeding 12-month period commencing July 1, 1985

---

[1] Inasmuch as the instant filing is not a tariff filing, no fee under Part 381 of the Commission's Regulations is required. *See,* 29 FERC ¶ 61,381 (1984).

(or at the customer's option, in a lump sum [2]) or at such later date as may be established in the Commission's order approving the direct billing procedure. Transco also is proposing to refund directly to its customers all retroactive Order No. 94 amounts collected, plus interest, pursuant to Transco's PGA filings in Docket Nos. TA84-2-29-000 and TA85-1-29-000, including the special Order No. 94 surcharge of 4.5 cents per dt contained in Transco's Docket No. TA85-1-29-000 filing, such refund (the principal amounts of which are detailed on Schedule B hereto) to be contingent upon approval of the direct billing procedures proposed in the instant filing. This refund will be made within fifteen days of the date on which the Commission approves Transco's direct billing procedure. In essence, Transco's proposal is designed to place customers in the position they would have been in if no retroactive Order No. 94 costs had been collected in Transco's rates to date, and then to apportion the total costs to customers on the basis of their respective purchase levels from Transco during the period such costs were incurred.

IV.

PERTINENT BACKGROUND

A. *Order 94 Costs*

Pursuant to Section 110 of the Natural Gas Policy Act of 1978, the Commission has established "production-related cost" allowances above the otherwise applicable maximum lawful ceiling price for nautral gas. These allowances encompass certain costs (other than "produc-

---

[2] While providing for a lump-sum payment option, Transco anticipates that most, if not all, customers would consider the twelve monthly installment payments to be in the best interests because, among other things, such method eases the financial burden and also could obviate payment, at least in part, if the pending court proceedings (see page 4, *infra*) were to overturn Order No. 94 during the interim.

tion costs") incurred for delivering, compressing, treating or conditioning nautral gas or other specified services. In Order No. 94 (issued July 25, 1980 in Docket No. RM80-47), the Commission stated that generic allowances for compression and gathering would be developed in future orders and made effective as of the date of Order No. 94. On January 24, 1983, the Commission issued Order No. 94-A, titled "Final Rule and Order on Rehearing of Order No. 94" amending the statement of policy. 22 FERC ¶ 61,055. The aforementioned generic allowances were first stated in an Interim Rule also issued January 24, 1983 in Docket Nos. RM80-73 and RM80-47 and were made effective March 7, 1983. The amendments of the Interim Rule were issued as a Final Rule in Order No. 334, issued September 27, 1983. Order 334-A, issued December 27, 1983, denied the petitions for rehearing and petitions for stay of Order 94. The allowances for production-related costs are set out at Section 271.1104 of the Commission's Regulations (18 C.F.R. § 271.1104).

Order Nos. 94 and 94-A have been appealed to the United States Court of Appeals for the Fifth Circuit by Transco and others in *Texas Eastern Transmission Corporation, et al. v. FERC*, No. 83-4390. Briefs have been filed by the parties and oral argument has been held; the case is pending a decision by the court.

Subsequently, the Commission issued Order No. 399-A, 29 FERC ¶ 61,254 (1984), which authorized producers to offset refunds due for Btu measurement requirements [3] by monies due them under Order No. 94. This "offset" procedure was overturned by the court in *Interstate Natural Gas Association of America v. FERC*, D.C. Cir. No. 81-1690, *et al.*, issued March 5, 1985. Such action was taken by the court at the behest of Associated Gas Distributors, a group which includes many of Transco's

---

[3] Interstate Natural Gas Association of America v. FERC, 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, 104 S.Ct. 1615 (1983).

larger customers. Therefore, as matters now stand, retroactive Order No. 94 payments apparently cannot be offset by refunds for the Btu measurement rules.[4]

B. *Transco's Treatment Of Order 94 Costs*

Transco has been invoiced for substantial retroactive Order No. 94 amounts. A substantial part of these amounts has been paid, debited to Account No. 191 and flowed-through in two Transco PGA filings. All of the retroactive Order No. 94 amounts that were paid prior to September 1, 1984 have been reflected in Transco's PGA filing in Docket No. TA84-2-29-000 (effective May 1, 1984)[5] or in Transco's PGA filing in Docket No. TA85-1-29-000 (effective November 1, 1984).[6]

In its PGA filing in Docket No. TA85-3-29-000 (effective April 1, 1985), Transco indicated that it would be seeking Commission authority to direct bill Order No. 94 payments. In that regard, Transco explained that its filing did not reflect the balance (at February 28, 1985) in the appropriate subaccount of Account No. 191 associ-

---

[4] It is Transco's understanding that although D.C. Circuit's mandate was issued on May 20, 1985, at least one—and perhaps more—of the interested parties intends to seek a writ of certiorari from the Supreme Court.

[5] In Docket No. TA84-2-29-000, Transco included approximately $2.2 million of retroactive Order No. 94 payments in its PGA deferred account. This amount reflects retroactive payments related to the period July 25, 1980 through August 31, 1983.

[6] In Docket No. TA85-1-29-000, Transco included approximately $22.4 million of retroactive Order No. 94 payments in its PGA deferred account. This amount reflects retroactive payments related to the period July 25, 1980 through February 29, 1984. In addition, Transco requested, and was granted, waiver of the Commission's regulations to include in the PGA and recover through a special surcharge of 4.5 cents per dt, approximately $21.6 million of known installment payments that Transco had not made at the time the PGA was filed but would make before the end of the period the rates in Docket No. TA85-1-29-000 were to be in effect.

ated with the relevant PGA period, $7,074,086, which amount relates to Order No. 94 payments not reflected in the surcharge and not previously contained in the deferred account. This amount remains deferred on Transco's books pending the outcome of the direct billing procedure proposed herein.[7] Transco's filing also explained that its direct billing procedure would include provision for crediting to customers the amounts already paid, including amounts paid through the special 4.5 cents per dt surcharge.

In addition, Transco has paid additional retroactive Order No. 94 amounts since February, 1985 and also is now processing a large amount of retroactive Order No. 94 invoices which, due to the time involved in verifying each such invoice, have not yet been paid. An accurate estimate of the timing of such payments cannot be made at this time.

There are other qualifying producers (*i.e.*, those which have made a proper notice filing in accordance with Section 271.1104 of the Commission's Regulations) to whom Transco also owes a substantial amount of retroactive Order No. 94 costs, but for which Transco has not received invoices. With respect to amounts attributable to the period after March 6, 1983, Transco may not receive invoices since such amounts relate to periods subsequent to the Commission-defined retroactive period and, therefore, as is the case for normal gas cost payments, invoices are not required for payment to be made. Pro-

---

[7] In its April 30, 1985 order in Docket No. TA85-3-29-000, the Commission, among other things, ordered Transco to furnish additional information regarding Order No. 94 charges, and to file revised PGA tariff sheets to recover Order No. 94 payments during the period covered by the current PGA, without prejudice to Transco's direct billing proposal. Transco intends to file revised tariff sheets but also to seek a stay of their effectiveness pending action on the instant petition, and to seek clarification of the Commission's April 30 order with respect to the revised PGA filing required thereby.

ducers will be paid for these amounts once Transco has verified the amount of the Order No. 94 allowance due, and these unit amounts are entered into Transco's gas purchase payment system.

V.

DESCRIPTION OF TRANSCO'S PROPOSED DIRECT BILLING PROCEDURE

A. *The "Retroactive" Period Is July 25, 1980 Through August 31, 1984*

Transco proposes to accumulate in a special subaccount of FERC Account No. 191 on its books all retroactive Order No. 94 amounts which it has paid or expects to pay related to the period July 25, 1980 through August 31, 1984. In that connection, Transco has been invoiced for substantial retroactive Order No. 94 amounts related to the period after March 6, 1983 (the effective date of Commission Order No. 94 and the termination date of the Commission-defined "retroactive" period). In numerous cases, these invoices were received several months after the period to which the payment applies and many of these invoices have yet to be verified. Due to the magnitude of these amounts and the time involved in verifying such amounts, these amounts could not be paid within a reasonable time after the period to which payments apply. Therefore, Transco is proposing to include payments related to periods after the Commission-defined "retroactive" period in the instant direct billing procedure. In that regard, however, Transco proposes to exclude from the total retroactive Order No. 94 amounts included in this special subaccount any such payments made over the deferral periods in Docket Nos. TA84-2-29 and TA85-1-29 (September, 1983 through February, 1984, and March, 1984 through August, 1984, respectively) which related to production during those deferral periods. Transco proposes to exclude such amounts from its special

subaccount since it views these amounts as essentially "current" payments and therefore such amounts are more appropriately recovered through the normal PGA mechanism rather than through the proposed direct billing procedure.

B. *Description of Direct Billing Procedure; Refunds For Past Collections*

The total retroactive Order No. 94 amounts which will be debited to Transco's special subaccount will be detailed by the production month to which they apply. These monthly amounts will be allocated to Transco's sales customers based on each such customer's share of purchases during each month of the proposed retroactive period. Allocating these amounts to customers on this basis results in the most equitable distribution of the cost responsibility related to these amounts, as discussed more fully in Part VI below.

As a part of the instant petition, Transco is proposing to refund directly all amounts, plus interest, Transco has recovered from the customers as a result of having included certain of these retroactive Order No. 94 amounts in Transco's PGA filings in Docket No. TA84-2-29-000 and Docket No. TA85-1-29-000, including amounts recovered from Transco's customers as a result of the 4.5 cents per dt special Order No. 94 surcharge which became effective November 1, 1984 in Docket No. TA85-1-29-000. Such refunds, detailed by customer and by PGA filing, are reflected on Schedule B, attached. The refunding of these amounts is contingent upon Transco receiving Commission authority for its direct billing procedure.

C. *Twelve Monthly Installments; Lump Sum Payment Option*

The allocated amounts of retroactive Order No. 94 payments will be billed customers directly, plus interest computed in accordance with the Commission's PGA regula-

tions, in equal monthly installments over a 12-month period beginning July 1, 1985 or such other date as established by the Commission in its order approving this procedure. Transco is proposing such monthly billing in order to ease the financial burden which would be caused by billing customers on a lump sum basis. Moreover, a court decision in the interim on the legality of Order No. 94 may effectively negate any further need for the procedure and subsequent payments thereunder. However, any customer which prefers to pay Transco is allocated share of these retroactive Order No. 94 amounts on a lump sum basis may choose to do so and thereby avoid the additional interest charges due as the result of Transco's proposed twelve monthly installment basis of payment.

D. *Showing Estimated Direct Billing By Customer; Adjustments Will Be Made to Reflect Actual Amounts*

Attached as Schedule A is an estimate of the total amount, excluding interest, Transco proposes to bill each of its customers in order to recover all amounts charged to the special subaccount at the time the direct billing procedure commences. Transco will credit this special subaccount monthly to reflect recovery of these amounts from its customers. As explained earlier, Transco has included in its direct billed amounts estimates of retroactive Order No. 94 amounts which it has been invoiced for but has not yet paid. To the extent Transco pays any amount which differs from the amount it has estimated, it will debit or credit the special subaccount by the amount which the actual payment differs from the estimate. At the end of the 12-month billing period, Transco will transfer any remaining balance or excess in this special subaccount to Account No. 191 and reflect this amount in its next PGA filing. In addition, Transco has reflected in its direct billing calculations approximately $18,900,000 of retroactive Order No. 94 amounts which

have been offset, pursuant to Commission Order No. 399-A, against amounts owed customers under Order No. 93. As previously noted, such offset procedure has been disallowed by order of the court but the court's decision may not be the final word on the subject.[8]

The amounts reflected on Schedule A necessarily are estimates, but Transco believes they are reasonably accurate. In any event, Transco intends to adjust such estimates for actual amounts, plus interest, and anticipates (a) that the actual amounts will not vary significantly from the estimates, and (b) that such actual amounts should be known prior to the completion of the twelve-month billing period. By way of further explanation, for retroactive Order No. 94 payments related to the years 1980, 1981 and 1982 it was necessary, for purposes of allocating these amounts to customers at this time, to estimate the production month in which these payments applied since only annual amounts are available without a detailed review of all producer invoices. For purposes of the estimates contained on Schedule A, Transco allocated each annual amount to the individual months based on total system purchases. While individual producer amounts thus estimated will vary (up and down) from the actual amounts which will be determined after the detailed review of all invoices, the aggregate amount and each customer's share) is not expected to vary from the estimated amounts to any significant de-

---

[8] Should the dispostion of the offset procedure for Btu measurement refunds remain unresolved as of the time Transco's direct billing procedure commences, Transco hereby agrees to reduce the balance in its special subaccount by the offset amounts, to reduce each customer's direct bill sums by each such customer's allocable share of these amounts, including interest, and to commence its direct billing procedure using such adjusted amounts. If the offset procedure ultimately is determined to be unlawful, Transco will increase the balance in its special subaccount and increase each customer's allocable share, including interest, utilizing the same procedures set forth herein.

gree. Such review of invoices is underway; substantial man-hours are involved in such undertaking.

Likewise, during the Commission-defined retroactive period July 25, 1980 through March 6, 1983, Transco paid certain gathering allowances which were in effect prior to the Commission approval of the generic allowances under Order No. 94. The allowances approved by the Commission pursuant to Order No. 94 replaced, retroactive to July 25, 1980, the allowances in existence prior to Order No. 94. Any payments made by Transco after March 6, 1983 did not include the full amount of charges related to the allowances approved under No. 94 in instances where other allowances in effect prior to Order No. 94 had already been paid by Transco. In these cases, the amount Transco actually paid retroactively was the difference between the allowance approved under Order No. 94 and the allowance in effect prior to Order No. 94. An analysis of representative months of the retroactive period reflects that approximately 91 percent of the total Order No. 94 amounts were actually paid on a retroactive basis. The remaining 9 percent were paid on a current basis via the allowances in effect prior to Order No. 94. Transco has utilized such estimated breakdown in calculating the direct billed amounts shown on Schedule A. Again, such amounts will be adjusted for actuals, plus interest, after the detailed review of invoices has been completed, and the final amounts are not expected to vary significantly from the estimated amounts.

At the time Transco completes the accounting review and adjusts its direct billing amounts to reflect actuals, those customers, if any, which opted for the lump-sum procedure will have the option to pay additional amounts, if any, on a lump-sum basis or to switch to a monthly basis, including interest, over the remaining months of the twelve-month billing period. Any reductions that may be due as a result of adjusting for actuals will be distributed to customers which opted for lump-sum billing

on a lump-sum basis, and to those customers which opted for monthly payments by reducing the remaining monthly billings by equal monthly amounts.

E. *Calculation of Interest on Payments and Credits*

The amounts which appear on Schedule A represent principal amounts only and therefore exclude any applicable interest. Transco will adjust the principal amounts to reflect interest to the date at which the billing procedure commences. Such interest on retroactive Order No. 94 payments will be calculated from the date of payment by Transco through the date the billing procedure commences. Inasmuch as Transco is proposing to give customers the option to pay these amounts over a 12-month period, additional interest will be calculated on these net amounts in order to determine each such customer's monthly payment. In addition, interest will also be calculated on amounts shown on Schedule B which will be refunded to each customer. As described earlier, these refunds result from the fact that certain retroactive Order No. 94 amounts have been included in PGA filings in Docket Nos. TA84-2-29-000 and TA85-1-29-000. Interest on these refund amounts will be calculated from the date when these amounts were paid by the customer through the date when the direct billing procedure commences. All such interest shall be calculated in accordance with the Commission's PGA regulations at the applicable interest rate in effect from time to time.

VI.

REASONS SUPPORTING DIRECT BILLING PROCEDURE

The direct billing procedure is the most logical and equitable method of assigning cost responsibility for this extraordinary, out-of-period item. These substantial retroactive payments relate to gas purchased by Transco from producers since mid-1980. Clearly, the matching

of such out-of-period costs to the customers' respective purchases, by month, during the period to which the costs are related is the most equitable method of allocating such costs. Thus, the proposed procedure will most clearly approximate the cost assignment that would have occurred had the payments been made at the same time as the gas purchases to which they relate. By the same token, collecting retroactive Order No. 94 payments through the regular PGA procedures would lead to a distortion of marketing signals because such costs relate to purchases made during prior periods.

Direct billing is supported not only by logic and equity, but also by precedent. Collecting these large retroactive Order No. 94 amounts through a pipeline's regular PGA mechanism is inconsistent with the Commission's treatment of other such out-of-period costs. Specifically, in Order No. 93, the Commission established a direct refund procedure for Btu measurement adustments wherein the pipeline's customers would be refunded these amounts based on their respective shares of purchases over the affected period. The Commission determined that flowing these large refund amounts through a pipeline's PGA could result in an inequitable distribution of refunds to the pipeline's customers. As the Commission explained in Order No. 399 issued September 20, 1984, the PGA mechanism is not appropriate for large out-of-period refunds (Mimeo, pp. 32-33):

> "The Commission believes that the use of the PGA mechanism to pass through the refunds could result in inequities. For example, customers which do not now purchase gas from an interstate pipeline would not receive a refund with a PGA pass-through, and it would be unfair if the customers actually overcharged did not receive a refund in the same proportion to their overcharges, given the magnitude and long-term nature of the overcharges.

> In contrast, the Commission believes that the lump-sum mechanism is a fair and equitable procedure. Specifically, the lump-sum mechanism ensures that refunds will be made to those customers who overpaid the pipelines, and this mechanism will return the refunds to the ultimate consumer more quickly. Finally, the Commission recognizes that the Btu refund may temporarily disrupt the current gas market. But, the Commission believes that a lump-sum cash payment requirement will disrupt the current natural gas market less than the use of the PGA mechanism, since a lump-sum gas payment is made to those over-charged and does not adjust current prices."

Transco believes that retroactive Order No. 94 payments should be treated in a similar fashion, particularly in light of the fact that Transco has numerous customers on its system that currently are purchasing at much lower levels than they did during the period to which the retroactive Order No. 94 amounts apply. If Transco continued to flow these amounts through its PGA, such customers would be assessed substantially less than their equitable portion of the cost responsibility related to these amounts. Not only does direct billing result in the most equitable treatment of customers, it also effectively forecloses any and all allegations or concerns regarding potential manipulation of PGA filings for competitive or other purposes.

It should also be noted that the Commission has approved direct billing of Order No. 94 costs in *Natural Gas Pipeline Company of America*, Docket No. RP85-18-000, letter order issued January 29, 1985, and has pending before it in Docket No. RP83-8-000 a settlement proposal —supported by Commission Staff—which would establish direct billing for Tennessee Gas Pipeline Company, a competitor of Transco.

VII.

MISCELLANEOUS MATTERS

A. Transco wishes to make it abundantly clear that the instant proposal is not intended to—nor will it—circumscribe or restrict in any way interested parties' rights with respect to questioning the appropriateness of individual retroactive Order No. 94 payments. *See*, letter order issued January 29, 1985 in *Natural Gas Pipeline Company of America*, Docket No. RP85-18-000, *mimeo* at 2.

B. Transco is serving the instant petition on its customers, state commissions and other parties normally served with Transco's rate filings, and on those additional parties which have intervened in Transco's PGA filing in Docket No. TA85-3-29-000 which relates to the instant filing in the manner explained hereinabove. Transco submits that good cause exists for expedited consideration and, to that end, requests that an abbreviated intervention and comment period be established.

C. Transco requests that the Commission grant any waivers of its Regulations as may be required to make the direct billing procedure effective as proposed.

VIII.

CONCLUSION

For all of the foregoing reasons, Transcontinental Gas Pipe Line Corporation respectfully submits that the above-described proposed direct billing procedure is in the public interest and should be authorized as expeditiously as possible.

Respectfully submitted,

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

By /s/ Robert G. Hardy
Its Attorney

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

SCHEDULE A

TOTAL AMOUNT OF RETROACTIVE ORDER NO. 94
AMOUNTS TO BE INCLUDED IN PROPOSED DIRECT
BILLING PROCEDURE

Rate Schedule	Customer	Total Retroactive Amounts 7/80-8/84
CD-1, PS-1, E-1	Atlanta Gas Light	$ 3,746,990.63
	United Cities, GA	305,039.27
	Total	$ 4,052,029.89
CD-2, PS-2, E-2	Carolina Pipeline	1,148,214.97
	Clinton-Newberry	244,356.19
	Columbia-Dranesville	576,254.60
	Commonwealth	3,462,946.37
	Danville	741,321.05
	Fort Hill	443,657.85
	Greenwood	352,906.52
	Laurens	218,533.72
	Lexington	342,136.18
	Lynchburg	438,135.18
	North Carolina Gas	370,153.65
	North Carolina Natural	5,219,044.03
	Piedmont	8,628,318.75
	Public Service of N.C.	5,956,928.22
	Shelby	477,508.30
	Washington Gas Light	3,769,022.30
	Total	$32,389,437.87
CD-3, PS-3, E-3 S-2	Brooklyn Union	10,467,032.67
	Columbia-Rockville	360,444.86
	Columbia-Downington	511,156.25
	Columbia-Muncy	570,630.38
	Consolidated Edison	17,983,883.88
	Delmarva	2,896,159.86
	Eastern Shore	1,056,760.22
	Elizabethtown	3,760,284.07
	Long Island Lighting	8,310,738.03
	National Fuel	866,463.97
	Pennsylvania Gas & Water	2,014,068.26
	Philadelphia Electric	5,837,284.24
	Philadelphia Gas Works	5,599,448.42
	Public Service E & G	20,362,432.34
	South Jersey	5,242,194.43
	Union Gas Company	538,467.72
	Total	$86,377,449.61

Rate Schedule	Customer	Total Retroactive Amounts 7/80-8/84
FI-2	Owens-Corning	240,110.47
G & OG 1, PS-1	Alexander City	115,236.47
	Bowman, GA	3,064.11
	Buford, GA	71,715.15
	Butler, AL	7,677.12
	Clanton, AL	32,951.62
	Commerce, AL	47,967.30
	Covington, GA	127,684.38
	East Central Alabama	48,751.35
	Elberton, GA	61,368.41
	Hartwell, GA	49,506.81
	Lawrenceville, GA	94,086.44
	Liberty, MS	7,011.12
	Linden, AL	77,360.33
	Madison, GA	15,338.66
	Maplesville, AL	6,293.11
	Monroe, GA	101,080.07
	Roanoke, AL	34,977.63
	Rockford, AL	1,977.06
	Royston, GA	19,801.31
	Social Circle, GA	20,131.85
	Sugar Hill, GA	17,454.23
	Thomaston, AL	1,693.51
	Toccoa, GA	99,044.93
	Tri-County Natural Gas	76,672.92
	Wadley, AL	3,874.27
	Wedowee, AL	5,758.20
	Winder	198,435.30
	Total	$1,346,913.64
G & OG 2, PS-2	Bessemer City, N.C.	52,202.77
	Blacksburg, S.C.	27,419.10
	Fountain Inn, S.C.	40,537.27
	Greer, S.C.	211,678.36
	Kings Mountain, N.C.	122,558.36
	Southwestern Va. Gas	254,909.73
	Union, S.C.	182,884.98
	United Cities—S.C.	316,862.13
	Total	$1,209,052.79

Rate Schedule	Customer	Total Retroactive Amounts 7/80-8/84
G & OG 3, PS-3	Columbia Gas (New Village)	127,695.48
	Fredrick Gas Co.	158,536.18
	U.G.I. Corporation	175,992.35
	Total	$462,224.01
ACQ-3	Consolidated Gas Supply	1,058,111.59
	North Penn	561,051.42
	Total ACQ-3	$1,619,163.01
X-20	Industrial Natural Gas	3,152.99
	Grand Total	$127,699,534.28

TRANSCONTINENTAL GAS PIPE LINE CORPORATION

SCHEDULE B

PRINCIPAL AMOUNT OF PROPOSED REFUNDS TO CUSTOMERS RELATED TO TRANSCO'S PROPOSED DIRECT BILLING PROCEDURE FOR RETROACTIVE ORDER NO. 94 AMOUNTS

			Refund Related To Docket No. TA 85-1-29		
Rate Schedule	Customer	Refund Related To Docket No. TA 84-2-29 [1]	Regular Deferred Account [2]	4.5 Cents/DT Special Surcharge [3]	Amount Total
CD-1, PS-1, E-1	Atlanta Gas Light	$ 60,708.99	$ 725,972.48	$ 700,311.15	$ 1,486,992.62
	United Cities, GA	5,258.03	48,571.51	46,854.63	100,684.17
	TOTAL	$ 65,967.02	$ 774,543.99	$ 747,165.78	$ 1,587,676.79
CD-2, PS-2, E-2	Carolina Pipeline	$ 389.19	$ 50,791.95	$ 48,996.59	$ 100,177.73
	Clinton-Newberry	2,651.61	47,573.46	45,891.86	96,116.92
	Columbia-Dranesville	(0.42)	49,510.84	47,760.75	97,271.16
	Commonwealth	46,090.66	323,543.41	312,106.95	681,741.01
	Danville	11,183.14	135,554.54	130,763.03	277,500.70
	Fort Hill	7,218.74	75,410.13	72,744.57	155,373.44
	Greenwood	6,219.09	57,402.15	55,373.13	118,994.37
	Laurens	3,463.06	36,582.37	35,289.27	75,334.70
	Lexington	7,364.55	61,467.79	59,295.06	128,127.41
	Lynchburg	8,219.28	55,911.81	53,935.47	118,066.56
	North Carolina Gas	5,170.84	58,971.28	56,886.80	121,028.92
	North Carolina Natural	78,127.39	802,234.70	773,877.69	1,654,239.78
	Piedmont	152,148.71	1,160,172.12	1,119,162.92	2,431,483.75
	Public Service of N.C.	99,000.50	1,033,382.59	996,855.08	2,129,238.16

	Shelby	9,740.53	81,172.86	78,503.60	169,216.99
	Washington Gas Light	50,968.70	230,162.29	222,026.63	503,157.62
	TOTAL	$ 487,955.56	$ 4,259,844.29	$ 4,109,269.37	$ 8,857,069.22
CD-3, PS-3, E-3, S-2	Brooklyn Union	$ 81,349.37	$ 1,091,054.60	$ 1,052,488.53	$ 2,224,892.50
	Columbia-Rockville	199.03	30,406.61	29,331.81	59,937.44
	Columbia-Downington	8.05	22,792.10	21,986.46	44,786.61
	Columbia-Muncy	1,446.03	69,529.94	67,072.23	138,048.21
	Consolidated Edison	322,916.80	2,215,474.10	2,137,162.59	4,675,553.49
	Delmarva	55,263.94	402,838.69	388,599.35	846,701.98
	Eastern Shore	14,623.18	116,395.92	112,281.62	
	Elizabethtown	50,295.18	433,298.99	412,982.95	901,577.12
	Long Island Lighting	162,424.23	1,060,096.93	1,022,625.14	2,245,146.29
	National Fuel	9,658.71	91,045.68	87,827.45	188,531.84
	Pennsylvania Gas & Water	34,073.85	324,722.69	313,244.55	672,041.09
	Philadelphia Electric	43,138.66	1,041,661.93	1,004,841.77	2,089,642.35
	Philadelphia Gas Works	18,006.47	807,558.41	779,013.23	1,604,578.11
	Public Service E & G	235,397.87	1,488,800.91	1,436,175.50	3,160,374.28
	South Jersey	65,441.92	729,663.53	703,871.73	1,498,977.17
	Union Gas Company	7,007.70	63,307.77	61,070.00	131,385.47
	TOTAL	$1,101,250.97	$ 9,988,648.82	$ 9,635,574.87	$20,725,474.66
FI-2	Owens-Corning	3,811.80	22,376.18	21,585.24	47,773.22
G & OG 1, PS-1	Alexander City	1,370.04	22,012.93	21,234.83	44,617.80
	Bowman, GA	27.17	789.07	761.18	1,577.41
	Buford, GA	588.35	16,992.10	16,391.48	33,971.93
	Butler, AL	57.95	1,635.60	1,577.79	3,271.34
	Clanton, AL	314.48	7,172.27	6,918.75	14,405.51
	Commerce, AL	503.78	9,793.61	9,447.44	19,744.83

TRANSCONTINENTAL GAS PIPE LINE CORPORATION—Continued

Rate Schedule	Customer	Refund Related To Docket No. TA 84-2-29 [1]	Refund Related To Docket No. TA 85-1-29 Regular Deferred Account [2]	Refund Related To Docket No. TA 85-1-29 4.5 Cents/DT Special Surcharge [3]	Refund Related To Docket No. TA 85-1-29 Amount Total
	Covington, GA	1,917.26	27,892.56	26,906.63	56,716.45
	East Central Alabama	564.62	9,953.76	9,601.92	20,120.30
	Elberton, GA	629.80	12,520.52	12,077.96	25,228.28
	Hartwell, GA	679.94	10,448.38	10,079.06	21,207.37
	Lawrenceville, GA	821.19	24,440.40	23,576.49	48,838.08
	Liberty, MS	13.08	941.28	908.01	1,862.37
	Linden, AL	1,932.82	13,489.28	13,012.47	28,434.57
	Madison, GA	112.63	3,803.29	3,668.85	7,584.77
	Maplesville, AL	43.05	1,746.96	1,685.21	3,475.21
	Monroe, GA	1,396.31	19,916.52	19,212.53	40,525.36
	Roanoke, AL	676.63	7,472.32	7,208.19	15,357.13
	Rockford, AL	11.09	486.13	468.95	966.16
	Royston, GA	158.26	4,389.66	4,234.50	8,782.43
	Social Circle, GA	336.94	4,165.52	4,018.28	8,520.73
	Sugar Hill, GA	152.74	4,646.09	4,481.87	9,280.69
	Thomaston, AL	8.98	378.84	365.45	753.26
	Toccoa, GA	1,157.62	19,114.40	18,438.75	38,710.77
	Tri-County Natural Gas	1,354.16	14,020.57	13,524.98	28,899.70
	Wadley, AL	21.86	1,087.15	1,048.73	2,157.74
	Wedowee, AL	34.30	1,442.01	1,391.04	2,867.35
	Winder	4,111.47	32,299.39	31,157.69	67,568.55
	TOTAL	$ 18,996.51	$ 273,050.61	$ 263,398.95	$ 555,446.07

G & OG 2, PS-2	Bessemer City, N.C.	$ 711.66	$ 6,029.05	$ 5,815.94	$ 12,556.65
	Blacksburg, S.C.	474.65	5,516.05	5,321.07	11,311.77
	Fountain Inn, S.C.	583.23	7,152.54	6,899.72	14,635.48
	Greer, S.C.	4,375.29	33,128.06	31,957.07	69,460.42
	Kings Mountain, N.C.	1,702.19	20,753.78	20,020.19	42,476.16
	Southwestern Va. Gas	4,393.88	37,942.70	36,601.52	78,938.09
	Union, S.C.	3,109.71	32,995.72	31,829.40	67,934.82
	United Cities—S.C.	4,258.30	39,211.73	37,825.70	81,295.73
	TOTAL	$ 19,608.91	$ 182,729.62	$ 176,270.58	$ 378,609.11
G & OG 3, PS-3	Columbia Gas (New Village)	$ 2,666.34	$ 17,609.97	$ 16,987.50	$ 37,263.81
	Fredrick Gas Co.	2,409.36	16,148.13	15,577.34	34,134.83
	U.G.I. Corporation	2,359.34	32,558.57	31,407.71	66,325.62
	TOTAL	$ 7,435.05	$ 66,316.67	$ 63,972.54	$ 137,724.26
ACQ-3	Consolidated Gas Supply	$ 0.00	$ 0.00	$ 0.00	$ 0.00
	North Penn	14,189.49	0.00	0.00	14,189.49
	TOTAL ACQ-3	$ 14,189.49	$ 0.00	$ 0.00	$ 14,189.49
	GRAND TOTAL	$1,719,215.32	$15,567,510.18	$15,017,237.33	$32,303,962.83

[1] Amounts collected from customers as a result of having included certain retroactive Order 94 amounts in Transco's regular PGA deferred account in Docket No. TA 84-2-29 (effective May 1, 1984).

[2] Amounts collected from customers as a result of having included certain retroactive Order 94 amounts in Transco's regular PGA deferred account in Docket No. TA 85-1-29 (effective November 1, 1984).

[3] Refunds related to Transco's 4.5 cents/DT special order No. 94 surcharge in Docket No. TA 85-1-29 effective November 1, 1984.

(7) (5)

No. 89-2001 and No. 90-131

Supreme Court, U.S.
FILED
SEP 6, [illegible]
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
Petitioners,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PIPELINE PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

MERLIN E. REMMENGA
PANHANDLE EASTERN PIPE LINE COMPANY
TRUNKLINE GAS COMPANY
5400 Westheimer Court
Houston, Texas 77056
(713) 627-[illegible]400

RAYMOND N. SHIBLEY
Counsel of Record
BRUCE W. NEELY
MARLENE L. STEIN
LEBOEUF, LAMB, LEIBY & MACRAE
1333 New Hampshire Ave., N.W.
Suite 1100
Washington, D.C. 20036
(202) 457-7500

Attorneys for Panhandle Eastern Pipe Line Company and Trunkline Gas Company

(Attorneys Continued on Inside Cover)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

KIM M. COCKLIN
Senior Vice President and
General Counsel
DOUGLAS FIELD, JR.
Assistant General Counsel
TEXAS GAS TRANSMISSION
CORPORATION
3800 Frederica Street
Owensboro, Kentucky 42301
(502) 926-8686

JEFFREY A. BRUNER
General Attorney
TRANSCONTINENTAL GAS PIPE
LINE CORPORATION
P.O. Box 1396
Houston, Texas 77251
(713) 439-3156

ROBERT W. PERDUE
ANDREWS & KURTH
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 662-2700
Attorneys for Texas Gas Transmission Corporation

ROBERT G. HARDY
MICHAEL J. FREMUTH
ANDREWS & KURTH
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 662-2700
Attorneys for Transcontinental Gas Pipe Line Corporation

September 6, 1990

TABLE OF CONTENTS

	Page
INTRODUCTION	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
CONCLUSION	10

TABLE OF AUTHORITIES

Cases: Page

Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 1, 3

Associated Gas Distributors v. FERC, 893 F.2d 349 (D.C. Cir. 1989), *reh'g denied*, 898 F.2d 809 (D.C. Cir. 1990), *petitions for cert. pending*, Nos. 89-1988, *et al.* 2, 9-10

Interstate Natural Gas Ass'n, Inc. v. FERC, 756 F.2d 166 (D.C. Cir.), *cert. denied*, 474 U.S. 847 (1985) 7

Interstate Natural Gas Ass'n, Inc. v. FERC, 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984) 6

Maislin Industries, U.S., Inc. v. Primary Steel, Inc., No. 89-624 (June 21, 1990) 1, 2-3

Mobil Exploration and Producing North America, Inc. v. FERC, 881 F.2d 193 (5th Cir. 1989) 9

Plaquemines Oil & Gas Co. v. FPC, 450 F.2d 1334 (D.C. Cir. 1971) 9

Texas Eastern Transmission Corp. v. FERC, 769 F.2d 1053 (5th Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986) 7, 8-9

Administrative Decisions and Orders:

Order No. 94, FERC Stats. & Regs. (CCH), Regs. Preambles ¶ 30,178 (1980) 8, 9

Order No. 94-A, FERC Stats. & Regs. (CCH), Regs. Preambles ¶ 30,419 (1983) 5, 6

Order No. 380, 49 Fed. Reg. 22,778 (1984), *aff'd sub nom. Wisconsin Gas Co. v. FERC*, 770 F.2d 1144 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986) 7-8

Order No. 399-A, 49 Fed. Reg. 46,353 (1984) 6

Order No. 436, 50 Fed. Reg. 42,408 (1985), *aff'd in part and vacated sub nom. Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) 8

TABLE OF AUTHORITIES—Continued

Page

Order No. 500-H, FERC Stats. & Regs. (CCH), Regs. Preambles ¶ 30,867 (1989), *aff'd sub nom. American Gas Ass'n v. FERC*, Nos. 87-1588, *et al.* (D.C. Cir. August 24, 1990) 8
Phillips Petroleum Co., 12 FERC ¶ 61,080 (1980) .. 8

Statutes:

Natural Gas Act
Section 4, 15 U.S.C. § 717c (1988) 4, 8-9
Section 4(d), 15 U.S.C. § 717c(d) (1988) 1, 2-3, 9
Natural Gas Policy Act
Section 110, 15 U.S.C. § 3320 (1988) .....*passim*

Regulations:

18 C.F.R. § 154.63(e)(2) (1990) 6

PIPELINE PETITIONERS' REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION

INTRODUCTION

The pipeline petitioners[1] hereby reply to the briefs in opposition filed by the Municipal Defense Group ("MDG") on July 25 and August 31, 1990, and by Columbia Gas Transmission Corporation, *et al.* ("Columbia") and Process Gas Consumers Group, *et al.* ("PGC") on August 31, 1990.

SUMMARY OF ARGUMENT

1. Respondents' briefs in opposition succeed only in showing that this case does indeed present a question worthy of this Court's review. First, respondents claim that the Court's decision late last term in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, No. 89-624 (June 21, 1990), forecloses the Commission from granting a waiver under Section 4(d) of the Natural Gas Act to permit a surcharge for gas sold in a past period, as it did here. But that is the precise question the Court expressly left open in *Arkansas Louisiana Gas Co.* v. *Hall* ("*Arkla* v. *Hall*"), 453 U.S. 571, 578 n.8 (1981). Whether *Maislin* intended to decide, *sub silentio*, the issue preserved for future consideration in footnote eight of the Court's opinion in *Arkla* v. *Hall* (as respondents claim) is itself surely a question worthy of this Court's plenary review. Second, respondents' own arguments demonstrate that the equitable allocation of large, past-period gas costs among pipeline customers is a serious and recurring problem in pipeline rate proceedings before the Federal Energy Regulatory Commission ("Commission"). The pervasiveness of this problem further reinforces the need for this Court to resolve the question of the Commission's statutory authority. Finally, by their own submissions, respondents would com-

[1] The list of all parent companies and subsidiaries of the petitioners, as required by Rule 29.1 of the Court's Rules, was provided on p. iii of the petition for certiorari in No. 89-2001.

pletely upset the time-honored symmetry of the statute by making utilities responsible for refunding past-period *overcharges* to all customers while allowing select groups of customers to escape their fair share of responsibility for past-period *undercharges*. This perversion of the statutory purposes likewise warrants this Court's review.

2. Respondents' briefs in opposition contain several material inaccuracies of fact. We correct those herein.

3. Finally, respondents plainly are wrong in urging that the Court deny certiorari in this case regardless of any action it may take in *Associated Gas Distributors* v. *FERC*, 893 F.2d 349 (D.C. Cir. 1989), *reh'g denied*, 898 F.2d 809 (D.C. Cir. 1990), *petitions for cert. pending*, Nos. 89-1988, *et al.* (*"AGD-II"*).

ARGUMENT

1. a. Both Columbia (Br. 21) and MDG (Br. 2 n.2, 8 n.7, 9, 22-23) argue that this case is controlled by the Court's recent decision in *Maislin Industries, supra*. We submit that this claim cannot withstand analysis, and that, in any event, respondents' own arguments demonstrate that this case presents an issue worthy of certiorari.

Reduced to its essentials, *Maislin*, like *Arkla* v. *Hall* and this Court's other "filed rate doctrine" cases, holds only that the terms of a private agreement for a regulated service, such as rail transportation, cannot, as a matter of law, supersede the filed rate. In *Maislin*, the Court held that this rule applied even when the regulatory body (in that case the Interstate Commerce Commission ("ICC")) declared in response to a referral from a federal trial court that the filed rate should *not* prevail. As the Court explained, the filed rate continued to have the force of law unless found to be "unreasonable" by the ICC, which did not occur. *Maislin*, slip op. 11-12 and n.10.

In contrast, this case concerns the *Commission's* authority, under the waiver provisions of Section 4(d) of

the Natural Gas Act, to approve a *change* in the filed rate, upon a proper filing by the regulated utility, permitting the utility to impose a surcharge for past undercollections that resulted from a Commission mandate to defer cost recovery. That is a question never before decided by this Court, and, indeed, expressly left open by Justice Marshall's opinion for the Court in *Arkla* v. *Hall*, 453 U.S. at 578 n.8. Columbia (Br. 18 and n.22) suggests that the cases appearing to recognize such a waiver power on the part of the Commission under Section 4(d) may have been implicitly overruled by *Maislin*. We disagree; but, in any event, respondents' submission by its own terms shows that this case raises a question worthy of certiorari.

There is absolutely no merit to the suggestion (Columbia Br. 3, 17-18; MDG Br. (No. 90-131) at 3) that this case is distinguishable from the situation envisioned by footnote eight in *Arkla* v. *Hall*, because of a purported lack of contractual agreement between the petitioner pipelines and their wholesale customers for payment by the customers of the costs at issue here. It is beyond dispute that the underlying service agreements between the pipelines and their customers, like the producer-pipeline contracts under which these costs originally were incurred, provide simply that the customer will pay the FERC-approved rate for gas, subject only to the customer's right to protest and seek a hearing concerning rate changes.

b. Columbia's theory of the case is that the "purchased gas adjustment" ("PGA") provisions found in many pipeline tariffs provide an effective and lawful method for recovering large amounts of deferred costs from past periods. *E.g.*, Columbia Br. 5 and n.7, Br. 10 and n.15, Br. 19. Thus, Columbia (Br. 10 n.15) notes that the Commission in one instance authorized one of the pipeline petitioners to collect some $170 million in unrecovered gas costs accured during a prior period by amortizing the total amount and collecting it in installments through its PGA account.

Again, Columbia's submission only reinforces our contention that this case does indeed warrant this Court's review. First, the instances cited by Columbia (and many others could be cited), in which gas purchase costs from past periods are passed through to pipeline customers in the current period, demonstrate that the problem presented here—*i.e.*, the deferred recovery of production-related costs under Section 110 of the Natural Gas Policy Act, 15 U.S.C. § 3320—is not an isolated or unusual situation, but rather a recurring problem, particularly during the massive restructuring now underway in the industry. The Commission's statutory authority to handle these situations in an equitable and lawful manner thus presents a question of very substantial practical importance.

Second, respondents, in attempting to discredit the direct billing methodology employed by the Commission in this case, prove too much. If the Commission is without power to impose the surcharge it attempted to impose in this case, as Columbia claims, then it is difficult to believe that the same costs would not be challenged if petitioners had employed a surcharge under the PGA mechanism. Indeed respondent MDG expressly challenges the use of the PGA for this purpose (MDG Reply Br. in *Columbia II* (filed August 22, 1989) at 5). Columbia (Br. 5 n.7) acknowledges that "the PGA mechanism for 'truing up' recovery of past gas costs is a departure from the normal process of setting fixed rates for the future based on estimates derived from historical experience," but suggests that the distinction lies in the fact that "the PGA mechanism itself is on file as part of the pipeline's tariffs." But that is no distinction at all, because the petitioner pipelines likewise proposed their direct billing plans by means of Section 4 rate filings; the Commission designated the charge as a "rate" and permitted it to become effective. *E.g.*, Pet. App. (No. 89-2001) 72a.

c. Respondents also claim that the direct billing mechanism approved by the Commission in this case promotes an "asymmetrical outcome" (Columbia Br. 17) by per-

mitting retroactive rate increases which undermine the "consumer protection" purposes of the Natural Gas Act (Columbia Br. 16-17; MDG Br. (No. 89-2001) 26-27; MDG Br. (No. 90-131) 12, 14, 16; PGC Br. 4-5). In truth, however, it is respondents' position that results in a perversion of the statutory purposes.

Under the respondents' view of the law (as adopted by the court of appeals in this case), if a pipeline *overcollects* its costs in one period, it has an absolute obligation to refund those amounts at the earliest possible moment, to assure that the refunds reach those consumers whose payments proved to be too high. Yet, if during the same period the pipeline *undercollects* its gas costs—either because of a flawed projection (as often happens in PGA proceedings) or (as here) because the Commission had not yet permitted the pipelines to include certain costs in their then-current charges—the respondents would allow the customer to avoid meeting its cost responsibility by simply cutting back on its current purchases, which would shift the same costs to other customers. The Natural Gas Act obviously was not enacted in order to enable one subgroup of consumers to benefit at the expense of others in this manner.[2]

2.a. Columbia is fundamentally wrong, as a factual matter, in its repeated references to "delay" by the petitioner pipelines in seeking to recover the Section 110 costs authorized under Order No. 94-A (Br. 6, 7, 20 n.25), and in its related suggestion (*id.* at 8 n.12) that the pipelines were dilatory in not filing their direct billing proposals until some two years after the moratorium

---

[2] The amounts at issue have long since been collected by the pipelines from their customers, including respondents. What respondents seek is to recover their payments and impose their share of the costs on the pipelines' other customer or on the pipelines themselves. None of the respondents has ever taken issue with the Commission's conclusion that the direct billing methodology is the most equitable way of allocating these costs among pipeline customers.

on cost recovery was lifted in 1983. In fact, as the respondents are well aware, the Commission and the industry throughout this period were intensively engaged in developing an appropriate, equitable means of permitting the pipelines to pass through to their customers the Section 110 costs at issue here.

First, Order No. 94-A, while lifting the moratorium as of January 1983, specifically permitted first sellers to collect the retroactive production-related costs from the pipelines "over a time period commencing with the date this order becomes effective and ending December 31, 1984." Order No. 94-A, FERC Stats. & Regs., Regs. Preambles (CCH) ("Regs. Preambles") ¶ 30,419 at 30,368 (1983). Consequently, many pipelines were precluded from filing to recover all the relevant costs until late 1984 or early 1985 at the earliest, even when they were promptly billed by their producer-suppliers (which often was not the case). *See* 18 C.F.R. § 154.63(e)(2).

Moreover, in order to minimize the impact of the pass-through of these production-related costs, the pipelines proposed and the Commission ultimately approved an alternative mechanism that would synchronize pipeline obligations to first sellers under Order No. 94-A with first seller refund obligations to the pipelines for essentially the same sales of gas. Specifically, this plan permitted the pipelines to offset their Section 110 costs payable to producers against the amounts the same producers owed the pipelines in refunds—due to overcollections from a separate Commission regulation that the D.C. Circuit had invalidated in 1983 in *Interstate Natural Gas Ass'n, Inc.* v. *FERC*, 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984). On November 20, 1984, the Commission approved this offset mechanism. Order No. 399-A, 49 Fed. Reg. 46,353 (1984). But, on March 5, 1985, a split panel of the D.C. Circuit (over a dissent by then-Judge Scalia) declared it invalid, on the ground that the pipelines' customers should get the refunds due from the producers immediately, without waiting to resolve issues concerning the amounts owed to the producers by the

pipelines. *Interstate Natural Gas Ass'n, Inc.* v. *FERC*, 756 F.2d 166 (D.C. Cir.), *cert. denied*, 474 U.S. 847 (1985).[3]

Thus, it was only shortly after the D.C. Circuit invalidated the offset plan in March 1985—and while the pipelines' challenge to the Commission's Section 110 rules was still pending before the Fifth Circuit[4]—that petitioner Transcontinental Gas Pipe Line Corporation, on May 22, 1985, filed the first of the pipeline direct billing proposals with the Commission. *See* Pet. App. (No. 89-2001) 60a; Columbia App. 1a-25a. The other pipelines filed their respective plans shortly thereafter. There was no "delay" on the part of the pipelines in this case. Moreover, in light of this history, in which all pipelines and their customers were involved, it is astonishing for respondents now to argue that they were unaware of their potential liabilities.

b. Equally inaccurate is Columbia's suggestion (Br. 20, 23) that the recent Commission-driven restructuring of the natural gas pipeline industry postdated the pipelines' direct billing proposals and thus has no connection with this case. In fact, the most critical event that allowed Columbia and its fellow respondents to cut back or discontinue gas purchases from their traditional pipeline suppliers was Commission Order No. 380,[5] issued in June 1984, at the heart of the events in this case. Order No. 380 invalidated longstanding minimum purchase agreements in contracts between interstate pipe-

---

[3] Ironically, were it not for that action by the D.C. Circuit, the "retroactivity" that the court condemned in the instant case simply would not have occurred.

[4] It was not until August 19, 1985, that the Fifth Circuit issued its opinion in *Texas Eastern Transmission Corp.* v. *FERC*, 769 F.2d 1053 (1985), *cert. denied*, 476 U.S. 1114 (1986), affirming the Commission's orders requiring retroactive payment of Section 110 costs by the pipelines to producers.

[5] Order No. 380, 49 Fed. Reg. 22,778 (1984), *aff'd sub nom. Wisconsin Gas Co.* v. *FERC*, 770 F.2d 1144 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986).

lines and their wholesale customers.[6] It was this dramatic, Commission-imposed seachange in pipeline gas sales markets that made it infeasible for the pipeline petitioners to attempt to recover Section 110 gas costs through the normal PGA process. In 1985, in Order No. 436,[7] the Commission, in effect, dropped the other shoe by mandating that the interstate pipelines become "open-access" transporters. Thus, Columbia's attempt to dissociate this case from the backdrop of industry restructuring must fail.

c. MDG also errs in its assertion (MDG Br. 21-22, 23) that the Fifth Circuit's *Texas Eastern* decision, which approved the retroactive billing of production-related costs by first sellers to their purchasers, did not arise under Section 4 of the Natural Gas Act, as this case does, but rather arose solely under Section 110 of the NGPA. MDG miscontrues this admittedly complex statutory scheme, which involves both the Natural Gas Act and the NGPA working in tandem.[8] As the Commission clearly articulated in the Order No. 94 series, Section 110 applies to *all* of the price categories set out in Title I of the NGPA, including those categories that remain subject to the Commission's Natural Gas Act

---

[6] The profound impact of Order No. 380 on pipeline sales is graphically illustrated in Table 3 of Commission Order No. 500-H, Regs. Preambles ¶ 30,867 at 31,520 (1989), *aff'd sub nom. American Gas Ass'n* v. *FERC*, Nos. 87-1588, *et al.* (D.C. Cir. August 24, 1990), which shows that gas sales by the interstate pipelines began to fall off precipitously, and that consequent pipeline exposure to producer claims for "take-or-pay" liability began to increase, immediately after issuance of Order No. 380 in 1984.

[7] Order No. 436, 50 Fed. Reg. 42,408 (1985), *aff'd in part and vacated sub nom. Associated Gas Distributors* v. *FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

[8] Thus, for example, Order No. 94 expressly permitted sellers of NGA-regulated gas "to apply for, and receive, production-related costs in addition to the Natural Gas Act allowances." Regs. Preambles ¶ 30,178 at 31,211 (1980); *see also id.* at 31,213, 31,214 and 31,216. *Accord, Phillips Petroleum Co.*, 12 FERC ¶ 61,080 (1980).

jurisdiction. Thus, the Fifth Circuit's holding in *Texas Eastern*, 769 F.2d at 1066, that the retroactive collection of Section 110 costs "was a fair balancing of the various problems involved" which did not constitute invalid retroactive ratemaking, necessarily *did* encompass, in part, producer sales that remained subject to Section 4 of the Natural Gas Act.[9] Accordingly, contrary to MDG's view, *Texas Eastern* is directly in conflict with the D.C. Circuit's decisions in the instant case.

3. Finally, we note that both Columbia and MDG take an unduly narrow view of the case when they assert (Columbia Br. 22-23; MDG Br. (No. 90-131) 17-18) that the issue presented here is distinct from that in *AGD-II*, *supra*, and therefore that the Court should deny the petition for certiorari here even if it grants the petition in *AGD-II*. In fact, the two cases are plainly related. Both concern the Commission's authority to authorize a surcharge premised upon a customer's purchases during a past period. Both cases arise in the midst of—and directly because of—a massive restructuring in the industry, which would cause grave inequities among different groups of ratepayers if the normal pass-through mechanisms were employed. In both cases, moreover, the D.C. Circuit adopted essentially the same restrictive view of the Commission's ratemaking powers under Section 4 of the Natural Gas Act. The only difference is that in this case the Commission grounded its decision in the waiver provisions of Section 4(d). But

---

[9] *Accord, Mobil Exploration and Producing North America, Inc.* v. *FERC*, 881 F.2d 193, 197 (5th Cir. 1989) ("Problems of retroactivity [in cases arising under Section 4] are resolved on the basis of balancing considerations of fairness and the necessities of practical administration.") (citations omitted); *id.* at 198 ("Although the successor's sales made prior to receiving a successor's certificate are in technical violation of the NGA and the filed rate doctrine, FERC can properly exercise its equitable powers to make the successor filing relate back to the time of transfer.") (*citing Plaquemines Oil & Gas Co.* v. *FPC*, 450 F.2d 1334 (D.C. Cir. 1971)).

that is a distinction which, if anything, militates in favor of the Court's granting plenary review in this case, rather than merely holding it in abeyance pending the outcome of *AGD-II*. It certainly does not suggest a basis for denying certiorari here.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Court should grant the petitions for certiorari in No. 89-2001 and in No. 90-131.

Respectfully submitted,

MERLIN E. REMMENGA
PANHANDLE EASTERN PIPE LINE COMPANY
TRUNKLINE GAS COMPANY
5400 Westheimer Court
Houston, Texas 77056
(713) 627-5400

RAYMOND N. SHIBLEY
Counsel of Record
BRUCE W. NEELY
MARLENE L. STEIN
LEBOEUF, LAMB, LEIBY & MACRAE
1333 New Hampshire Ave., N.W.
Suite 1100
Washington, D.C. 20036
(202) 457-7500
Attorneys for Panhandle Eastern Pipe Line Company and Trunkline Gas Company

KIM M. COCKLIN
Senior Vice President and General Counsel
DOUGLAS FIELD, JR.
Assistant General Counsel
TEXAS GAS TRANSMISSION CORPORATION
3800 Frederica Street
Owensboro, Kentucky 42301
(502) 926-8686

ROBERT W. PERDUE
ANDREWS & KURTH
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 662-2700
Attorneys for Texas Gas Transmission Corporation

JEFFREY A. BRUNER
General Attorney
TRANSCONTINENTAL GAS PIPE LINE CORPORATION
P.O. Box 1396
Houston, Texas 77251
(713) 439-3156

ROBERT G. HARDY
MICHAEL J. FREMUTH
ANDREWS & KURTH
1701 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 662-2700
Attorneys for Transcontinental Gas Pipe Line Corporation

September 6, 1990

No. 89-2001 and No. 90-131

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
Petitioners,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

JOHN H. CHEATHAM, III *
Senior Vice President and
General Counsel
555 13th Street, N.W.
Suite 300 West
Washington, D.C. 20004
(202) 626-3200
Attorney for Interstate Natural Gas Association of America

August 31, 1990

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-2001

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
Petitioners,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

No. 90-131

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Interstate Natural Gas Association of America ("INGAA") respectfully moves pursuant to Rule 37.2 for leave to file the attached brief *amicus curiae* in these cases. Petitioners have consented to INGAA's filing of this brief. The consent of the respondents was requested but refused.

STATEMENT OF INTEREST

INGAA is a non-profit national trade association representing virtually all of the major interstate natural gas transmission companies operating in the United States.

The companies account for over 90 percent of all natural gas transported and sold for resale in interstate commerce. INGAA's members also include major Canadian interprovincial pipelines subject to regulation by the National Energy Board of Canada. INGAA's U.S. members are regulated by the Federal Energy Regulatory Commission ("Commission") under the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717 *et seq.* (1988), and to a lesser extent, under the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301 *et seq.* (1988).

REASONS FOR GRANTING THE MOTION

These cases involve orders of the Commission which permitted natural gas pipelines to direct bill their customers for certain production costs that the Commission had previously required the pipelines to pay producers for past sales of gas. The United States Court of Appeals for the District of Columbia Circuit held that notwithstanding the Commission's finding of "good cause" for waiving the notice requirement in Section 4(d) of the NGA, the direct billing by the pipelines of such costs constituted retroactive ratemaking in violation of the filed rate doctrine.

The issue in these cases is therefore similar to the issues presented in *FERC* v. *Associated Gas Distributors, petition for cert. pending*, No. 89-2016 (filed June 21, 1990), in which the Commission has sought review of another D.C. Circuit opinion which held that a Commission order authorizing a pipeline's recovery of take-or-pay costs using the purchase deficiency methodology prescribed in Order No. 500 violated the filed rate doctrine by permitting retroactive ratemaking. *Associated Gas Distributors* v. *FERC*, 893 F.2d 349 (D.C. Cir. 1989) ("*AGD II*"). INGAA has filed a motion for leave to file *amicus curiae* in support of the Commission's petition for writ of certiorari in that case.

The costs at issue herein are substantial. They total approximately $1.5 billion for the industry, and approximately $500 million with respect to the five pipelines—all of which are INGAA members—which sought to direct bill their costs and for which direct billing was authorized by the Commission. The court of appeals' decision, if affirmed, will constitute yet another impediment to the transition of pipelines from their former role primarily as gas merchants to a new role in which they are predominantly gas transporters. This necessary transition cannot be completed unless and until pipelines have put behind them the disputes and resulting costs of restructuring their gas purchase arrangements.

Over and above the impact of the court of appeals' decision on the ability of pipelines to recover their costs in a manner consistent with current competitive markets, the decision represents an unjustified extension of the filed rate doctrine, a misinterpretation of the rule against retroactive ratemaking, and a failure to accord proper deference to the Commission's ratemaking expertise.

INGAA, as representative of the interstate natural gas pipeline industry which is directly affected by the court of appeals' decision, has a unique perspective and interest which will aid this Court in its consideration of the issues herein.

CONCLUSION

WHEREFORE, for the foregoing reasons, INGAA respectfully requests that the following brief in support of petitioners be accepted for filing.

Respectfully submitted,

JOHN H. CHEATHAM, III *
Senior Vice President and
General Counsel
555 13th Street, N.W.
Suite 300 West
Washington, D.C. 20004
(202) 626-3200
Attorney for Interstate Natural Gas Association of America

August 31, 1990

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
CONCLUSION	8

TABLE OF AUTHORITIES

Cases: Page

Associated Gas Distributors v. FERC, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) 7

Associated Gas Distributors v. FERC, 893 F.2d 349 (D.C. Cir. 1989), *petitions for cert. filed*, 59 U.S.L.W. 3001 (U.S. June 20, 1990) (No. 89-1988), 59 U.S.L.W. 3001 (U.S. June 21, 1990) (Nos. 89-1989, 89-1990), 59 U.S.L.W. 3001 (U.S. June 22, 1990) (No. 89-2000), and 59 U.S.L.W. 3005 (U.S. June 21, 1990) (No. 89-2016) 2, 6

Columbia Gas Transmission Corp. v. FERC, 831 F.2d 1135 (D.C. Cir. 1987), *modified on reh'g*, 844 F.2d 879 (D.C. Cir. 1988) 3, 4, 6

Columbia Gas Transmission Corp. v. FERC, 895 F.2d 791 (D.C. Cir. 1990), *petitions for cert. filed*, 59 U.S.L.W. 3005 (U.S. June 22, 1990) (No. 89-2001) and 59 U.S.L.W. 3065 (U.S. July 18, 1990) (No. 90-131) 4

Electrical District No. 1 v. FERC, 774 F.2d 490 (D.C. Cir. 1985) 4, 6

FPC v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944) 5

Texas Eastern Transmission Corp. v. FERC, 769 F.2d 1053 (5th Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986) 3, 5

Transwestern Pipeline Co. v. FERC, 897 F.2d 570 (D.C. Cir. 1990), *petition for cert. filed* (U.S. August 24, 1990) (No. 90-344) 2, 6

Administrative Orders and Cases:

Order No. 94, 45 Fed. Reg. 53,099 (1980), FERC Stats. & Regs. [Regulations Preambles 1977-81] ¶ 30,178 (1980) 3

Order No. 94-A, 48 Fed. Reg. 5152 (1983), FERC Stats. & Regs. [Regulations Preambles 1982-85] ¶ 30,419 (1983) 3

Transcontinental Gas Pipe Line Corporation, 45 FERC ¶ 61,169 (1988) 4

TABLE OF AUTHORITIES—Continued

Statutes: Page

Natural Gas Act, 15 U.S.C. §§ 717 *et seq.* (1988) .. 2
Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301 *et seq.* (1988) 2
§ 110, 15 U.S.C. § 3320 5
§ 601(c), 15 U.S.C. § 3431(c) 5

Miscellaneous:

43 Fed. Reg. 56,448; 56,575-56,577 (1978) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-2001

PANHANDLE EASTERN PIPE LINE COMPANY, *et al.*,
Petitioners,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

No. 90-131

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

COLUMBIA GAS TRANSMISSION CORPORATION, *et al.*,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF AMICUS CURIAE ON BEHALF OF THE INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Interstate Natural Gas Association of America ("INGAA") is a non-profit national trade association representing virtually all of the major interstate natural gas transmission companies operating in the United States. The companies account for over 90 percent of all natural gas transported and sold for resale in interstate commerce. INGAA's members also include major Cana-

dian interprovincial pipelines subject to regulation by the National Energy Board of Canada. INGAA's U.S. members are regulated by the Federal Energy Regulatory Commission ("Commission") under the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717 *et seq.* (1988), and to a lesser extent, under the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301 *et seq.* (1988).

SUMMARY OF ARGUMENT

This case presents another in a series of recent decisions by the United States Court of Appeals for the District of Columbia Circuit relying on the "filed rate doctrine" to usurp the authority of the Commission to establish just and reasonable rates. *See Associated Gas Distributors* v. *FERC*, 893 F.2d 349 (D.C. Cir. 1989) (*"AGD II"*), *petitions for cert. filed*, 59 U.S.L.W. 3001 (U.S. June 20, 1990) (No. 89-1988), 59 U.S.L.W. 3001 (U.S. June 21, 1990) (Nos. 89-1989, 89-1990), 59 U.S.L.W. 3001 (U.S. June 22, 1990) (No. 89-2000), and 59 U.S.L.W. 3005 (U.S. June 21, 1990) (No. 89-2016); *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570 (D.C. Cir. 1990), *petition for cert. filed* (U.S. August 24, 1990) (No. 90-344). The extended procedural history of the decision below graphically illustrates the seriously adverse effects of the D.C. Circuit's rulings in this area. As will be explained in this Brief, the D.C. Circuit has adopted a novel, and legally unsupportable, interpretation of the filed rate doctrine with which to reject the Commission's determination that certain purchased gas costs incurred by pipelines may not be recovered by means of a direct bill. Contrary to the lower court's decision, the rates at issue in this case neither violate the filed rate doctrine nor authorize unlawful retroactive collection. These rates were properly filed with the Commission and were found by the Commission to be just and reasonable when they were put into effect.

Because this case presents issues similar to those raised by the Commission in its petition for writ of certiorari in *AGD II*, INGAA recommends that certiorari be granted in the instant cases.

ARGUMENT

This case graphically illustrates the seriously adverse and inequitable effects of the D.C. Circuit's restatement of the filed rate doctrine. In 1978, the Commission issued interim regulations allowing producers to apply on an individual basis for recovery of production-related costs. 43 Fed. Reg. 56,448; 56,575-56,577 (1978). Two years later, the Commission decided to defer any assessment of such costs until completion of a "generic," industry-wide proceeding but stated that its final rule would authorize recovery of the costs for the period required to complete the rulemaking. *See* Order No. 94, 45 Fed. Reg. 53,099 (1980), FERC Stats. & Regs. [Regulations Preambles 1977-81] ¶ 30,178 (1980). A final rule was not issued until 1983. Order No. 94-A, 48 Fed. Reg. 5152 (1983), FERC Stats. & Regs. [Regulations Preambles 1982-85] ¶ 30,419 (1983). The Fifth Circuit subsequently affirmed Order No. 94-A and specifically approved the collection of production-related costs within the guidelines provided by Order No. 94-A. *Texas Eastern Transmission Corp.* v. *FERC*, 769 F.2d 1053, 1066 (5th Cir. 1985), *cert. denied*, 476 U.S. 1114 (1986).

The protracted proceedings engaged in by the Commission and the generous allowances provided by its final rule resulted in the payment of extremely large lump sum costs. Given this background, and the enormous pressure being imposed on pipeline rates by the general industry restructuring then underway, the Commission authorized collection of these costs by means of a direct bill. The D.C. Circuit rejected these orders in *Columbia Gas Transmission Corp.* v. *FERC*, 831 F.2d 1135 (D.C. Cir. 1987), *modified on reh'g*, 844 F.2d 879 (D.C. Cir. 1988)

(*"Columbia I"*). The court held that such direct billing constituted retroactive ratemaking in violation of the filed rate doctrine because "downstream purchasers are expected to pay a surcharge, over and above the rates on file at the time of sale, for gas they had already purchased." 831 F.2d at 1140. In so holding, the court stated that the purpose of the filed rate doctrine is to maintain "predictability" in the rates that will be charged and concluded that the challenged orders provided no such predictability for the pipelines' downstream customers. 831 F.2d at 1141 (*citing Electrical District No. 1* v. *FERC*, 774 F.2d 490, 493 (D.C. Cir. 1985)).

On remand, the Commission concluded that direct billing of production-related costs covered by Order No. 94-A was warranted "in the context of the overriding public interest in the orderliness of the nation's natural gas markets and the ultimate benefit to gas consumers which will thereby result." *Transcontinental Gas Pipe Line Corporation*, 45 FERC ¶ 61,169 at 61,487 (1988). In doing so, the Commission concluded that, in light of the dramatic changes in natural gas markets which had occurred during the protracted proceedings involving Order Nos. 94 and 94-A (in particular the Commission's efforts to restructure natural gas markets based on competitive market principles), a direct billing cost recovery mechanism was needed to achieve an equitable allocation of costs without unduly disturbing market signals to pipeline customers. *Id.* at 61,486-61,487. Notwithstanding the Commission's clear affirmation that a direct billing mechanism was necessary to achieve equity and the goal of allowing natural gas prices to be set by competitive market forces, the D.C. Circuit again set aside the Commission's order. *Columbia Gas Transmission Corp.* v. *FERC*, 895 F.2d 791 (D.C. Cir. 1990) (*"Columbia II"*), *petitions for cert. filed*, 59 U.S.L.W. 3005 (U.S. June 22, 1990) (No. 89-2001) and 59 U.S.L.W. 3065 (U.S. July 18, 1990) (No. 90-131).

INGAA urges the Court to put an end to the regulatory stalemate engendered by the D.C. Circuit's action in this and other cases. In this instance, interstate pipelines have endured a ten-year wait—first for clarification of their obligations to pay and now for authorization to collect the costs arising from Order No. 94. The D.C. Circuit has never suggested that the production-related costs at issue are not proper costs for passthrough to pipeline customers. Instead, it has made passthrough a practical impossibility and has thereby thwarted the Commission's regulatory reform efforts. Simultaneously, it has effectively penalized the interstate pipelines involved in this case (in an amount in excess of $500 million in production-related costs incurred by them) for acting in reliance on the Fifth Circuit's decision that collection of production-related costs was properly authorized. *Texas Eastern Transmission Corp.* v. *FERC*, 769 F.2d at 1066.

Interstate pipelines subject to the Commission's jurisdiction are statutorily entitled to a reasonable opportunity to recover their prudently incured costs. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944). The Order No. 94 costs at issue herein were found by the Fifth Circuit in *Texas Eastern* to be owing to the producers pursuant to Section 110 of the NGPA, 15 U.S.C. § 3320 (1988). Such costs accordingly are entitled to be treated as prudently incurred costs, and thus pipelines must be afforded a reasonable opportunity to recover them. Indeed, Section 601(c) of the NGPA, 15 U.S.C. § 3431(c) (1988), guarantees that, absent fraud, abuse, or similar grounds, pipelines may pass through any amounts paid with respect to any purchase of natural gas, including costs such as production-related costs covered by Section 110. Therefore, neither the Commission nor any court has authority to preclude pipeline recovery of these costs.

Only this Court can put an end to the lower court's serious misapplication of the governing statutory provisions. The appellate courts and the Commission must be

given clear guidance so that regulated interstate pipelines can know the rules under which they must operate and thus do business with reasonable assurance that the current regulatory uncertainty will be terminated.

In this regard, it is important for the Court to note that the D.C. Circuit's decision in this case is only one of a series of decisions grounded in its peculiar interpretation of the relationship between the filed rate doctrine and the retroactive ratemaking doctrine. The D.C. Circuit has recently applied the reasoning adopted in *Columbia I* as its basis for holding in *AGD II* that the Commission's purchase deficiency method of allocating take-or-pay costs violated the filed rate doctrine. *AGD II*, 893 F.2d at 355-356. INGAA has filed a motion for leave to file a brief *amicus curiae* in support of petitioner, the Commission, in that proceeding. *FERC* v. *Associated Gas Distributors, petition for cert. pending*, No. 89-2016 (filed June 21, 1990). Similarly, in *Transwestern Pipeline Co.* v. *FERC*, 897 F.2d 570 (D.C. Cir. 1990), *petition for cert. filed* (U.S. August 24, 1990) (No. 90-344), the D.C. Circuit has relied on its view of the filed rate doctrine to prohibit a pipeline from relying on direct billing to recover certain amounts in its purchased gas adjustment account. *Id.* at 577 (*citing Columbia I* and *Electrical District No. 1, supra*).

INGAA submits that certiorari should be granted in this proceeding for the same reasons set forth in INGAA's brief *amicus curiae* in *AGD II*; that is, the D.C. Circuit has incorrectly and unjustifiably expanded the filed rate doctrine and the rule against retroactive ratemaking and has thereby improperly limited the Commission's ratemaking authority by substituting its judgment for that of the Commission. As noted by the Commission and the pipelines in their respective petitions for certiorari herein, the D.C. Circuit in this case followed essentially the same analytical approach as it did in *AGD II*. Fur-

thermore, as explained by the Commission, in practical terms, both cases are related since they both involve the allocation of costs by pipelines in the wake of an industry restructuring to promote competitive market conditions.

It is clear that pipelines are entitled to a reasonable opportunity to recover prudently incurred costs and to guaranteed passthrough of gas purchase costs pursuant to the provisions of NGPA Section 601(c).[1] Not only will the D.C. Circuit's decision affect recovery of costs, it will also have the predictable effect of prolonging regulatory uncertainty and thus will exacerbate the disruption attendant on the Commission's massive restructuring of the industry.

INGAA supports the Commission's assertion that the Supreme Court's disposition of *AGD II* will shed considerable light on the appropriate disposition of this case. Nevertheless, there are material differences in the facts underlying each case. Accordingly, INGAA submits that each case should be addressed on the merits individually, applying the Court's ruling on the proper application of the filed rate doctrine and the retroactive ratemaking doctrine to each case, as appropriate.

---

[1] To the extent that recovery of costs is limited to adding such costs to the pipelines' commodity rates, the D.C. Circuit has conceded that the result is tantamount to a denial of cost recovery. *Associated Gas Distributors* v. *FERC*, 824 F.2d 981, 1025-1026 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988) (*"AGD I"*).

CONCLUSION

For the foregoing reasons, the petitions for writ of certiorari should be granted.

Respectfully submitted,

JOHN H. CHEATHAM, III *
Senior Vice President and
General Counsel
555 13th Street, N.W.
Suite 300 West
Washington, D.C. 20004
(202) 626-3200

Attorney for Interstate Natural Gas Association of America

August 31, 1990

* Counsel of Record